Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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Appellants appeal from the judgment of the United States District Court for the Northern District of Alabama, Southern Division, entered on October 18, 1973, denying Appellants'

application for preliminary and permanent injunction and dismissing the Complaint and Petition for Injunction and Declaratory Judgment, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The opinion of the District Court for the Northern District of Alabama, Southern Division, is not yet reported. A copy of the Opinion and Order of the three-judge court by District Judge Pointer is attached hereto as Appendix A.

JURISDICTION

This suit was brought pursuant to 28 U.S.C. § 1343(3) and 2201, based on a cause of action under 42 U.S.C. § 1983. A three-judge court was requested to be convened pursuant to 28 U.S.C. §§ 2281 and 2284 to enjoin the use by Appellees of certain Alabama statues as unconstitutional. The Opinion and Order of the three-judge district court was entered on October 18, 1973. The Notice of Appeal is attached hereto as Appendix B. The jurisdiction of the Supreme Court to review the decision of the district court by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

QUESTIONS PRESENTED

Whether the Younger v. Harris, 401 U.S. 37 (1971) and Samuels v. Mackell, 401 U.S. 66 (1971) requirements for

injunctive and declaratory relief were correctly applied where no criminal proceeding was pending in the state court to close the premises.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Alabama Nuisance Statutes, Alabama Code, Title 7, Sections 1091-1108 and Alabama's Obscenity Statute, Title 14, Sec. 374. The pertinent provisions thereof, along with the pertinent provisions of the *First, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States* are attached hereto as Appendix C.

STATEMENT OF FACTS

One of the appellants, Herbert Jenkins, Jr., on the behalf of the State of Alabama, filed a suit dated March 7, 1973, In Equity, being case No. 177-199, against MTM, Inc., Chester McKinney, Thomas McGary and fictitious parties, seeking to permanently enjoin the maintenance of a nuisance at the Pussycat Adult Theatre of 7610 – 1st Avenue North in the City of Birmingham under Title 7, Sec. 1091 et seq., Code of Alabama 1940 (Recompiled 1958). The nuisance alleged consisted of repetitive acts which purportedly cummulated to a nuisance. The alleged repetitive acts were numerous convictions (none of which is final) for violation of the obscenity laws of the City of Birmingham for showing obscene movies and selling obscene matter at said premises. The action was instituted pursuant to the State statute specifically Sec. 1107 of Title 7. (See Appendix C.)

A hearing in State Court was held on May 24, 1973 on the Plaintiff's Application for a Temporary Injunction and Issuance of a Restraining Order; an order was issued granting a Temporary Injunction Closing the Pussycat Adult Theatre, (see Appendix D). The present action was filed on May 3, 1973, seeking to have the Federal Court enjoin the enforcement of the Temporary Injunction issued by the State Court judge and to have the State statute under which it was granted declared unconstitutional as written and/or as applied.

The requisite three-judge court was requested pursuant to *28 U.S.C. §§2281* and *2284*. The Appellees sought to utilize an *Alabama statute, Title 7, Section 1107* which declared that the use of any premises in violation of any of the provisions of the *Criminal Code of Alabama* shall constitute a public nuisance.

The statutory provisions of *Alabama Code, Title 7, Sections 1091-1108* inclusively, were attacked by Appellants as being unconstitutional on vagueness and overbreadth grounds as well as being violative of their due process and, further, because they do not warrant a nuisance action either by manner of dissemination or unwarranted intrusions into the public's privacy. *Rabe v. State of Washington*, 405 U.S. 313 (1972); *80 Drive-In v. Baxley*, 478 F.2d 611 (1972) (drive-in theatre viewable to the public from the main road).

Title 7, Sections 1091-1108 were challenged as being unconstitutional as written and as applied because they authorize a prior restraint on materials which are presumptively protected under the *First Amendment* of a kind condemned by the Supreme Court in an unbroken line

of cases beginning with *Near v. Minnesota*, 283 U.S. 697 (1931) and continuing through *New York Times Co. v. United States*, 403 U.S. 713 (1971) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) and others. The statutes were also attacked as denying due process and equal protection in that the statutes make a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance. This labelling of a business as a public nuisance on the basis of a single isolated transaction was also attacked as creating an invalid presumption of the type condemned by the United States Supreme Court in *Leary v. United States*, 395 U.S. 1532. It was further attacked as denying *Fifth* and *Fourteenth Amendment* rights to have every element making up a nuisance to be proven by competent evidence, in a *First Amendment* context, beyond a reasonable doubt.

The Appellant operated a book store and retail store combination in the City of Birmingham on property appropriately zoned. These public organizations were engaged in the sale and/or exhibition of books, magazines, newspapers, motion picture films and other materials which are presumptively protected by the *First Amendment* to the *Constitution* of the *United States*.

The publications offered for sale and/or exhibition by the Appellant are comparable to those declared not to be obscene by the Supreme Court and many inferior Federal Courts, as

well as state appellate courts, and hence, are protected expression under the *First Amendment* to the *United States Constitution*. No sales or offerings are made to persons under eighteen years of age (minor) of any of the adult-type publications or movies distributed or exhibited by the Appellant, nor are they "pandered" in the Ginzburg-sense, nor are the materials sold in such a way that unwilling persons cannot avoid them.

Separate convictions have been obtained for obscenity against employees of the Appellants for distributing or exhibiting obscene material upon the premises owned by the Appellants. All convictions are on appeal and no judgment is final as of this writing. The three-judge panel dismissed the action and refused to grant injunctive relief on the basis of *Younger v. Harris*, 401 U.S. 37 (1971). The Court held that the propriety of federal intervention in the circumstances presented had been decided by the Fifth Circuit Court of Appeals in *Palais v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972) and therefore, since the state court action was not brought in bad faith[1] or for purposes of harassment and Appellants did

[1] The Defendants and/or their agents, servants and employees have established a pattern of conduct under color of enforcement of state law, customs and city ordinances within the City of Birmingham, Alabama of harassment and bad-faith prosecutions, under facially invalid statutes and ordinances, attempting the ultimate suppression of presumptively protected publications, motion pictures and materials without, to this date, ever having had any final judicial determination that any of said publications, motion pictures or materials are, in fact, obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees will continue to engage in the acts of utilizing nuisance laws, as well as other unconstitutional

not present any "special circumstances which would justify federal intervention," the complaint must be dismissed. The Court dismissed the complaint and did not abstain, thereby retaining jurisdiction. The effect of the words of the decision was founded on abstention. However, the act of the three-judge panel in dismissing the case without retaining jurisdiction appears to be an adjudication on the merits.

In that the majority of the three-judge court finding that *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases[2] as interpreted by the Fifth Circuit in *Palaio v. McAuliffe*, *supra*, required non-intervention, the action was dismissed and this appeal follows.

(Footnote 1 Continued)
enactments and conduct that has had the effect of perpetuating a "chilling effect" upon the exercise of Plaintiffs' *First Amendment* rights, as well as the right of interested adult citizens of the City of Birmingham and the State of Alabama, and of the other forty-nine states who may visit Alabama and who wish to exercise their *First Amendment* right to buy, review and view non-obscene publications and films. The frantic efforts on the part of Defendants to close Plaintiffs' businesses and the threatened closure under the guise of the abatement of a nuisance constitute attempts at a constitutionally invalid "prior restraint" which is condemned by the *First*, *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* and which might be apropos in a police state, but is anathema to a free society such as our.

[2] *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 79 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

THE QUESTION IS SUBSTANTIAL

The question presented herein is virtually identical with that presented in *Speight, et al v. Slaton, et al*, No. 72-1557, Probable Jurisdiction Noted October 16, 1973, argued January 7 and 8, 1973.

This Court is now also considering the following question in *Steffel v. Thompson*, No. 72-5581:

> "Did the Court below correctly apply the *Younger v. Harris*, 401 U.S. 37 (1971) and *Samuels v. Mackell*, 401 U.S. 66 (1971) standards to deny petition *declaratory relief* in a situation which did not involve a pending State criminal prosecution?"

This case was argued before the Court on November 13, 1973 and according to published reports the questioning of the Court related to whether or not the principles of *Samuels v. Mackell*, 401 U.S. 66 (1971) bar declaratory judgment intervention when no prosecution is pending and the attack is on a statute "as applied." Mr. Justice White also raised the question that if that were so, would there not also be a case or controversy problem which may bar declaratory relief.

The question presented in the case at bar relates to whether or not the *Younger v. Harris*, supra and *Samuels v. Mackell*, supra requirement apply to deny petitioners *injunctive and declaratory relief* in a situation which did not involve a pending State criminal prosecution.

It may well be that the decision of this Court in the Steffel case or the Speight case may not adequately answer the question posed by counsel. Unlike Speight, the State Court has closed the premises occupied by one of the Appellants and the same has been remained closed by Order of the State Court since March of 1973, almost one full year.

This case raises important issues regarding whether a showing of irreparable injury or other extraordinary circumstances is required in order for a federal court to grant injunctive and declaratory relief in cases which involve a pending state civil proceeding but do not pose a threat to state criminal prosecutions. This question was not expressly decided by *Younger v. Harris, supra*, which itself dealt with a criminal case. Mr. Justice Black wrote,

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. 41.

The concurring opinion of Mr. Justice Stewart in *Younger v. Harris*, 401 U.S. at 55, in which Mr. Justice Harlan joined, makes clear the limited nature of the holding in that case:

> "... [s]ince all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently."

However, the majority of the three-judge court in the case at bar, while recognizing explicitly the fact that *Younger v. Harris*, supra, and its companion cases did not decide the issue, felt bound by *Palaio v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972) and the following language therein:

> "We believe, however, that application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal', but rather should be

governed by analysis of the competing interests that each case presents (and) when federal anticipatory relief will significantly affect a state's enforcement–by whatever means–of its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes."

"We thus pose a limited answer to the question expressly reserved in *Younger, supra*, by holding that, *where plaintiff is unable to prove the existence of 'special circumstances,' the principles of Younger bar federal intervention in a state civil proceeding that is an integral part of a state's enforcement of its criminal laws.*" (Emphasis supplied.)

1. *Palaio v. McAuliffe, supra*, is incorrect in its reasoning and its holding, and, in any event, is not applicable to the present case. In that case, the Solicitor General of the Criminal Court of Fulton County, Georgia, instituted proceedings in the Fulton County Superior Court to have two named motion pictures declared obscene and subject to seizure. Shortly before the date set for the state court hearing Palaio and others filed complaints in federal district court seeking injunctions against pending and future criminal and civil proceedings against them and a declaration that the procedures employed in the state court suit were constitutionally invalid. On March 17, 1971, after the state judge had found probable cause for declaring one of the motion picture films obscene and after the state criminal prosecution of the appellants in *Palaio v. McAuliffe, supra*, had begun, the federal district judge concluded that the suit to declare the motion pictures subject to seizure was a good-faith effort by Georgia officials to enforce Georgia criminal laws, and accordingly held that dismissal was dictated by *Younger v. Harris, supra*.

By the time the appeal reached the Circuit Court of Appeals the criminal prosecution was pending and the Fulton Superior Court had been affirmed by the Supreme Court of Georgia on October 7, 1971, in *1024 Peachtree Corp. v. Slaton*, 228 Ga. 102, 184 S.E.2d 144.

The Circuit Court of Appeals agreed with the characterization by the Supreme Court of Georgia of the suit to declare the film subject to seizure as a part of Georgia's program of enforcing its criminal laws. It pointed out that a three-judge federal court has suggested such suits might afford a method of obtaining the constitutionally required adversary hearing prior to the arrest and prosecution of one for the sale of allegedly obscene materials. *Gable v. Jenkins*, N.D. Ga. 1969, 309 F.Supp. 998, aff'd. per curiam, 397 U.S. 592 (1970). This ignores the compulsory self-incrimination aspects of such a proceeding which forces one to furnish a film to the court as the beginning of a prosecution for exhibiting that same film.

The Circuit Court of Appeals also relied upon language by the Supreme Court in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 437 (1957) recognizing that such civil suits "supplement the existing conventional criminal provisions dealing with pornography." However, the quoted portion did not refer to "such civil suits." Instead, it referred to §22-a of the New York Code of Criminal Procedure (L. 1941, C. 925), as amended in 1954 (L. 1954, C. 702). Section 22-a of the New York Code of Criminal Procedure was upheld because it had procedural safeguards. The Alabama procedure has none.

In a case similar to this one, decided after *Younger v. Harris*, supra, and its companions, this Court ruled that 42

U.S.C. §1983 is an exception to the Anti-Injunction Statute, 28 U.S.C. §2283, *Mitchum v. Foster*, 407 U.S. 225 (1972). The dissent of Chief Justice Burger, in which Justices White and Blackman joined, urged the district court on remand to consider

> "whether general notions of equity or principles of federalism similar to those invoked in Younger, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." *Id.* at 244.

Assuming, *arguendo*, that the "civil as basically an enforcement of criminal law" theory of *Palaio, supra*, is correct, that is not the case here. While all the materials proffered by the state into evidence are or have at one time been the basis of criminal prosecutions against individuals, the disposition of the instant case will not, in the words of *Palaio, supra*, "significantly affect a state's enforcement – by whatever means – of its criminal laws." 466 F.2d 1230 at 1233. The pending criminal prosecutions will remain pending no matter what the disposition of this case. Thus the instant case cannot be characterized as civil enforcement of criminal laws. Appellee's complaint requested the following:

> "(a) . . . injunctions, both temporary and permanent, against the conduct and operation of the Harem Bookstore . . . by any person; and

> "b" . . . an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with the advertising, sale and exhibition for sale of said merchandise, to be contraband and to be forfeited and destroyed."

That this is an impermissible prior restraint of constitutionally protected materials is obvious and will be discussed hereinafter. Here, however, its inclusion is to show that what is being sought here is qualitatively and substantively different from what took place in *Palaio, supra*, and, *Palaio* is not controlling.

2. The decision of the three-judge district court is in conflict with the decision of this Court in *Lake Carriers Association v. MacMullan*, 406 U.S. 498 (1972) in which it was held that abstention was not required by *Younger v. Harris, supra*, and its progeny in an action for injunctive and declaratory relief against the enforcement of the Water Pollution Control Act of the State of Michigan. The statute provided, *inter alia*, that a violation of its provisions would be punished as a criminal misdemeanor. 406 U.S. at 502. The three-judge court involved there held that the complaint failed to state a justiciable controversy and that compelling reasons justified federal abstention.

This Court found a constitutionally relevant justifiable controversy but that abstention was appropriate. However, all but one of the District Court's grounds for abstention were rejected. This Court held that abstention was appropriate because the state court could settle the question of a correct construction of the new act, and possibly avoid the federal question once federal regulations were promulgated.

To reach that decision this Court was compelled to consider the implications of *Younger v. Harris* and *Samuels v. Mackell*. Mr. Justice Brennan found that the stringent post-prosecution tests are inapplicable to a case in which there was no criminal prosecution which was to be enjoined:

> In *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), this Court, held that, apart from 'extraordinary circumstances,' a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on consideration of equity practice and comity in our federal aystem that have little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. See generally *Perez v. Ledesma*, 401 U.S. 82, 93 (1971) (separate opinion)." 406 U.S. 498, at _____

The separate opinion referred to is that of Mr. Justice Brennan himself. Since this Court has held that the stringent *Younger v. Harris* and *Samuels v. Mackell* tests do not apply in a suit prior to or not involving criminal prosecutions then the decision of the District Court in this case conflicts with *Lake Carriers Assoc. v. MacMullan, supra.*

3. The decision appealed from is in conflict with the principles enunciated by this Court in *Gibson v. Berryhill*, 411 U. S. 564, (1973). In that case, Berryhill and others were licensed optometrists employed by Lee Optical Co. and were not members of the Alabama Optometric Association because membership therein was limited to optometrists practicing privately. They were charged by the Association with unprofessional conduct within the meaning of the state optometry statute because of their employment with the company. The complaint was filed with the Alabama Board of Optometry (board) all members of which were Association members. Two days thereafter the Board brought its own suit in state court against the optometrists and their employer, Lee Optical, to enjoin the company from practicing optometry. The action before the Board was stayed pending the outcome of the state court action. The charges against the individual defendants were dismissed but the state trial court enjoined Lee Optical from engaging in the practice of optometry. The company appealed. The Board, in the meantime, revived the Association's charges against Berryhill and the other appellees, who sought an injunction in the Federal District Court under the Civil Rights Act claiming that the Board was biased. The District Court enjoined the Board proceedings but thereafter the State's highest court reversed the state trial court and held that the optometry law did not prohibit a lecensed optometrist from working for a corporation. Thereafter, the Board appealed to the Supreme Court. This Court held that neither the rule of *Younger v. Harris*, 401 U.S. 37 or principles of comity required the District Courts to dismiss the suit in view of the pending Board proceedings. The reasoning that compelled the conclusion that intervention was proper despite the pending actions is applicable here.

This Court unanimously held that a predicate for a *Younger v. Harris* dismissal is "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." A competent tribunal was not present in *Gibson v. Berryhill* because the State Board of Optometry was incompetent by reason of bias to adjudicate the issues before it.

The remaining predicate for a *Younger v. Harris* dismissal – the opportunity to raise and *have timely decided* the federal issues involved – is not present.

Because of the above facts irreparable harm would be present in letting the state court adjudicate the issues involved in the instant case as surely as it was present in *Gibson v. Berryhill, supra*, in which the tribunal was incompetent because of bias.

4. The decision of the three-judge district court is in conflict with the result of the decision of a three-judge court in the Western Division of the United States District Court for the Northern District of Ohio in *Pursue, Ltd. v. Huffman*, _____ F. Supp. _____ No. C 72-432, decided April 20, 1973. In that case a suit was brought under 42 U.S.C. §1983 seeking injunctive relief and declaratory judgment against the assertedly unconstitutional provisions of the Ohio nuisance statute, O.R.C. §§3767.01, et seq., as it pertains to the exhibition of obscene movies. Huffman, Prosecutor of Allen County, Ohio, filed a civil complaint seeking a temporary and permanent injunction closing the Cinema I Theatre in Lima, Ohio, on the grounds that obscene movies were being shown therein in violation of applicable statutes. After a hearing on Huffman's motion for a temporary injunction the Court entered an order closing the theatre for an indefinite period. A complaint was filed in the district court and the district

court stayed the state court injunction, but only to the extent that that injunction forbade the showing of films which had not been held to be obscene in a prior adversary hearing.

Thereafter, Huffman applied for a hearing for the purpose of conducting a prior adversary hearing on films not yet reviewed and to consider his application for a permanent injunction against the theatre. The Court ordered the theater closed for one year unless released by order of the Court pursuant to compliance by the owners of the theater with certain statutory requirements.

Pursue, Litd., as successor in interest of the original leaseholder, filed a complaint in the district court seeking a temporary restraining order and preliminary and permanent injunctive relief against the state court judgment and declaratory judgment respecting the asserted unconstitutionality of the Ohio statute. Without even discussing the issues of abstention or comity the three-judge court asserted jurisdiction and held the Ohio statute to be an impermissible prior restraint on First Amendment rights and therefore unconstitutional. Obviously, as did Circuit Judge Morgan in the instant case, that panel had no difficulty in finding irreparable harm in the closing of the place of business.

The *Pursue, Ltd.* case is not unknown to this Court, in that the following has occurred with respect to said case:

A. On or about May 23, 1973 Petitioners Huffman and Fair filed the following documents in this Court:

(i) Motion for Leave to File Petition for Writ of Mandamus or Prohibition, Petition for Writ of Mandamus or Prohibition, and Brief in Support Thereof; Docket No. 72-1613 Misc.

(ii) Motion to Advance Date Set for Filing of Briefs in Opposition to Petition;

(iii) Application to Honorable Potter Stewart for Stay Order or Writ of Injunction.

B. On June 12, 1973, Petitioners' Application for Stay, No. A-1199, presented to Mr. Justice Stewart, was denied.

C. On June 25, 1973 this Court entered the following order in the instant matter:

> "The application for stay or writ of injunction presented to Mr. Justice Stewart and by him referred to the Court and the motion to advance are denied. The motion of Pursue, Ltd., to participate as a party respondent is granted."

D. On or about July 5, 1973 James J. Clancy, Attorney for Petitioners applied to the Court for an extension of time (No. A-53, Re: *Huffman, et al v. Pursue, LTD*) in which to docket an appeal from the opinion and order of April 20, 1973.

E. On July 9, 1973 Mr. Justice White signed an order extending the time for docketing an appeal to and including August 14, 1973.

F. On or about August 14, 1973 a Jurisdictional Statement was filed in this Court appealing the Opinion and Order of the statutory three-judge court on April 20, 1973, docketed as *Huffman et al v. Pursue, LTD* No. 73-296 on this Court's calendar which Jurisdictional Statement is for the most part identical in substance to the Petition for Writ of Mandamus or Prohibition.

G. On September 17, 1973 Pursue, LTD, Respondent herein, filed a Motion to Dismiss or Affirm, and no action has been taken by the Court in No. 73-296.

H. On or about October 23, 1973, *Pursue, Ltd.* as respondent filed a Response in Opposition to Petition for Writ of Mandamus or Prohibition in case No. 72-1613 Miscallaneous.

I. On or about November 12, 1973 this Court denied the Petition for Writ of Mandamus or Prohibition in No. 72-1613.

5. There is no remedy available to Appellants in the state courts of Alabama. It is also true that the decisions of the Courts of Alabama have already approved the use of the public nuisance approach to the regulation of "obscene" materials.

6. The substantive issue involved on the merits is of paramount importance and its resolution is necessary by this Court in view of the place occupied by the Free Speech and Press provisions of the First Amendment in a democracy. Moreover, the closing of a bookstore or theater under the guise of abating a public nuisance is a constitutionally impermissible prior restraint and violates the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Appellees, in their Complaint to close the Appellants' store and theater as a public nuisance, made it quite clear that they do not seek merely the cessation of what they view as illegal activity on the premises (i.e., the possession, for sale, of obscene materials), but have asked for temporary and permanent injunctions against the further operation of the Appellants' businesses.

It has been well recognized by this Court that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

> "The *First Amendment* requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line ... Our insistence that regulations of obscenity scrupulously embody the most vigorous procedural safeguards ... is ... but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks ...'. *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963)." *Blount v. Rizzi*, 400 U.S. 410, 416, 417 (1971).

See also: *Heller v. New York*, 413 U.S. 483, (1973) and *Roaden v. Kentucky*, 413 U.S. 496, (1973).

Moreover, this Court has made it clear that since

> "the line between speech unconditionally guaranteed and speech which may legitimately be regulated ... is finely drawn ... [t]he separation of legitimate from illegitimate speech calls for ... sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Appellees, under their planned use of the nuisance concept, do not plan to separate protected from unprotected speech; they merely seek to prevent all kinds of speech, at the premises, by closing their doors forever by labelling it a public nuisance.

As did the system condemned in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this method of obscenity regulation conveniently makes recourse to the criminal process unnecessary.

> "Any prior restraint on expression comes to [the Supreme Court] with a 'heavy presumption' against its constitutional validity. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

In considering the validity of an injunction forbidding the distribution of "any literature" by the petitioners, the Supreme Court, in *Organization for a Better Austin v. Keefe*, noted that

> "in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on *First Amendment* rights.

> Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

The only difference between that case and the instant case is that the population of Birmingham is several times that of the City of Westchester, Illinois, the one referred to above and hence, a far greater number of people will be deprived of access to materials which are presumptively protected by the *First* and *Fourteenth Amendments* to the *Constitution of the United States*.

The proposed injunction, it should be noted, does not enjoin the sale or distribution of specific materials shared as "obscene" instead, by closing the store, it enjoins the sale of any press materials whether obscene or otherwise. The Court of Appeals for the Fourth Circuit has recently recognized that

> "the Supreme Court has made it clear that laws which regulate activities protected by the First Amendment must be more than merely rational, and are not accorded the presumption of constitutionality normally accorded to acts of the legislature. *United States v. Congress of Industrial Organization*, 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948)." *United States v. Crowthers*, 456 F.2d 1074, 1080.

The Court went on to hold that to abridge activities protected by the *First Amendment*,

> "the government must have a compelling interest to justify the abridgment and the scope of the abridgment must not be greater than reasonably necessary to serve the government's purpose. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945)." *United States v. Crowthers, supra*, at 1080.

The idea advanced above, sometimes referred to as the "less drastic means" doctrine, requires that

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purposes." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The Fifth Circuit has noted that in the area of *First Amendment* freedoms,

> "the overbreadth doctrine plays an important role, for it requires the legislature to focus narrowly on the particular evils it wishes to combat when speech is at stake," *Hobbs v. Thompson*, 448 F.2d 456, 470 (1971).

In *Roth v. United States*, 354 U.S. 476, 488 (1957), the decision upholding the right to regulate obscenity, it was said:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being

> of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

The cases cited above make clear that the blunderbuss approach to the regulation of obscenity represented by declaring the premises or the store to be a nuisance (even assuming valid, final convictions for violation of obscenity statutes thereon in the past) cannot be made to conform to the standards of the *First, Fifth* and *Fourteenth Amendments*. First, there is an adequate remedy at law for violations which have occurred in the past, *i.e.*, the criminal penalty. Second, declaring the business to be a nuisance does not comport with the less drastic means test because it completely prevents the dissemination of even protected materials. Third, a lesser measure, an injunction against the dissemination of "obscene" materials, would operate as a prior restraint, would induce self-censorship, and would not give such notice as to what conduct was prohibited as to be enforceable. In addition, it would place the bookseller in the position of having to prove that he was not violating the injunction by proving the offending material is, in fact, protected. This is, of course, also contrary to established doctrine that the burden of proof is upon the censor. *Speiser v. Randall*, 357 U.S. 513 (1958). Fourth, there are no safeguards by which a judicial decision as

to whether the materials are, in fact, protected will be forthcoming within any stated period of time, thus ensuring a restraint of only such duration as is necessary for sound judicial resolution of the issues. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and *Blount v. Rizzi*, 400 U.S. 410 (1971).

The decision of the Supreme Court of the United States in *Near v. Minnesota*, 283 U.S. 697 (1931), makes very clear the vice of the Appellees proposed procedure against Appellants wherein it states, at page 713:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter – in particular that the matter consists of charges against public officers of official dereliction – and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship."

The same judgment, that the operation and effect is "the essence of censorship", is appropriate here.

In a later portion of the opinion, the Court answered the argument that the statute dealt not with publication *per se*, but with the business:

"In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the 'business' of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constituional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made." *Near v. Minnesota, supra*, at 720.

In 1962, the Supreme Court had before it the case of *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. That case concerned the proper construction of *18 U.S.C. §1461* and its application to the nude male magazines involved therein. The concurring opinion at 370 U.S. 503, 504 of Mr. Justice Brennan, speaking for himself, Mr. Chief Justice Warren, and Mr. Justice Douglas, dealt with the possible constructions of the statute, which dealt with regulation of obscenity through the mails:

"There are two possible constructions of *§1461* on the basis of this brief Senate discussion. One possibility is that short of breaking seals, the postmasters could remove matter which they thought from its face or the name of its sender to be obscene. The second construction is that postmasters could remove matter but only to turn it over to the appropriate authorities as the proposed subject of a criminal prosecution – and also of course after that material had been determined, in a criminal trial of its sender, to be obscene. Support for this second construction is found not only in the brief 1865 Senate consideration itself but also in an 1888 statute amending *§1461*, and enacting a second banning material with obscene matter on its face and – unlike *§1461* – explicitly providing that it 'shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe.'

"The 1865 Senate discussion is not unambiguous, but I cannot suppose that Senator Johnson – who had already noted his awareness that much obscene material was discoverable without breaking seals, and even so, his determined opposition to its being stopped – would have accepted Senator Sherman's suggestion had he understood it to mean more than that the Post Office could stop obviously questionable matter for the purpose of transmitting it to prosecuting authorities, could stop matter already held obscene if it were sent again, and could investigate matter sent by persons previously convicted and, if the matter were found violative, could present it to the prosecuting authorities. I believe this is the correct construction of the 1865 enactment. But at least *it is arguably correct, and necessary if we are to avoid the section's probable constitutional infirmity (see Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 2d 1357, 51 S.Ct. 625;*

> *Summerfield v. Sunshine Book Co., 95 App.D.C. 169, 221 F.2d 42) if construed as a provision allowing the Postmaster General to exclude all matter sent by a person who had previously sent violative matter."* (Emphasis supplied.)

This reasoning compels the conclusion that not only may materials not be proscribed which have not been judicially found obscene, but also that even assuming that a valid conviction has been obtained as a result of the sale of obscene material at a given location, it is not constitutionally permissible to put a blanket prohibition on further sales of any materials.

The validity of the reasoning and approach of the Supreme Court in *Near* is more apparent now than ever before. The Appellants herein who have not ever proven violations of the law arising out of the business of the subject bookstore are engaged, purely and simply, in attempted censorship and suppression of materials which they cannot establish are unlawful, but which they personally find offensive. This Court, charged as it is with the duty of preventing erosions of those fundamental freedoms which set this country apart from all others, should not countenance such tactics.

Case law involving the suppression or attempted suppression of allegedly obscene materials on nuisance grounds is scant and not uniformly consistent. Nevertheless, the better reasoned opinions prohibit the kind of relief sought by the Appellees in their action.

A recent case, and one directly in point on the merits, is *Pursue, Ltd. v. Huffman*, ____ F. Supp. ____ (No. C72-432, U.S.D.C.N.D. Ohio, decided April 20, 1973), discussed above. In that action a permanent injunction was issued against the enforcement of a state court order closing an Ohio theatre as a nuisance pursuant to an Ohio statute. The decision held that the statute and its application to the theatre constituted an overly broad prior restraint upon First Amendment rights.

In another case out of the U.S. District Court for the Western District of Tennessee, Western Division, entitled AIRWAYS THEATRE, INC. and SOUTHLAND THEATRES, INC., Plaintiffs, v. PHILIP M. CANALE, District Attorney General, DAVID M. PACK, Attorney General of Tennessee and WINFIELD DUNN, Governor of the State of Tennessee, Civil C-73-262, filed November 19, 1973, the court held that Tennessee's nuisance statute was unconstitutional. The statute was held to be unconstitutional by this unanimous three-judge panel for at least two reasons; one of which related to the definition of places of nuisance, which could be applied to include one's home and secondly, that

> "seizures of press materials, fixtures, furnishings and equipment and stock used in or in connection with the maintaining or conducting of a nuisance, shall be subject to seizure immediately upon detection by any law enforcement officer ... thus, once there is a determination of obscenity by a law enforcement officer, seizure of the property may take place."

The three-judge court held that the procedure flew in the face of the decision of the U.S. Supreme Court in *Roaden v. Kentucky, supra.* (Opinion attached hereto as Appendix E.)

Several state courts have reached the same conclusion. In *New Riviera Art Theatre v. State*, 412 S.W. 2d 890 (Tenn. 1967), the Supreme Court of Tennessee construed a statute under which the District Attorney General of the Sixth Judicial District of Tennessee sought a temporary injunction enjoining the Defendants from showing or disposing of a film entitled "London Night Life" or other such film, or acquiring such other films. A permanent injunction was prayed for, after a hearing, and a determination the films complained of were obscene.

After a hearing, the Trial Court found certain named films to be obscene and decreed, at 892:

> "It is, therefore, ordered, adjudged and decreed, pursuant to the authority in Tennessee Code Annotated, Section 39-3005 (c) that the defendants, New Rivieria Art Theatre of Chattanooga, Inc., and H. W. Hill, be permanently enjoined from the further or future showing of the films and 'Coming Attractions' or 'Trailers' of the sort, kind or type which may be classified by the court as 'obscene material' under the definition of Tennessee Code Annotated, Section 39-3007."

The Appellants insisted first, that the statute in question did not authorize the granting of an injunction, temporary or permanent, enjoining the showing of any and all films by the parties sought to be enjoined. The Court agreed, stating that the statute comprehended injunctions only against obscene material and added, at 412 S.W. 2d 893, 894, the following:

> "The granting of a temporary injunction prohibiting the defendants from showing any film had the effect of closing the theatre and was an unconstitutional application of the statute in violation of defendants' constitutional rights of freedom of speech and due process."

The Appellants also complained about the permanent injunction prohibiting defendants from showing other films and coming attractions or trailers of the sort, kind or type which may be classified by the Courts as obscene material.

The Court agreed:

> "The statute does not authorize an injunction to restrain the acquisition and display of unidentified films, coming attractions or trailers which a court might in the future hold to be obscene. Such a construction of the statute would vest in the courts an unlimited power of prior restraint on the freedom of speech and press.
>
> "Such an interpretation would also place the burden upon the defendants of determining whether any film they might acquire might be classified by the court as obscene material."
>
> "The burden is on the District Attorney General to show the material sought to be enjoined from sale or display is unprotected by the first amendment to the constitution of the United States. *Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965).

"We agree this portion of the decree is obviously in violation of the first, fifth and fourteenth amendments to the Federal Constitution. *Kingsley Books, Inc. v. Brown, supra.*" *New Rivieria Art Theatre v. State, supra,* at 895.

The Supreme Court of Florida, in *Mitchum v. Florida ex rel Schaub,* 250 So.2d 883 (1971), had occasion to consider a Trial Court's permanent injunction which was worded as follows:

"ORDERED AND ADJUDGED that the Respondents cease and desist from selling, offering for sale or causing to be sold or offered for sale obscene or pornographic publications in violation of F.S.A. 847.011 . . . "

The Court condemned this order succintly and directly:

"The 14th Amendment of the United States Constitution requires that regulation of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression or publication. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). The operation and effect of the method by which sale of publications is to be restrained must be very carefully defined. Cf. *Speiser v. Randall,* 357 U.S. 513 (1958). We are of the view that a blanket injunction is constitutionally invalid because it does not put the seller on notice as to what is prohibited, and thereby creates an unacceptable restraint upon hisfreedom to vend publications. Cf. *Smith v. California,* 361 U.S. 147 (1959); *Freedman v. State of Maryland,* 380 U.S. 51 (1965). See, *New Riviera Art Theatre v. State,* 412 S.W. 2d 890 (Tenn. 1967)."

The Florida Court went on to note that a permanent injunction, reading as follows, had been entered by the Trial Court:

"ORDERED AND ADJUDGED that the operation of the Adult Book and Movie Store at 1437 Main Street in the City of Sarasota, Florida, by said respondents constitutes the maintaining of a public nuisance and Matthew Rocks and Bob Mitchum are hereby enjoined from the further operation of or maintenance of said business premises so as to annoy the community and to become manifestly injurious to the morals or manners of the people."

This, too, was found to be unacceptable.

"This injunction is also invalid. A business involved in the dissemination of publications cannot be declared a nuisance in this manner. See *Near v. Minnesota ex rel. Olson,* 283 U.S. 697 (1931)."

The Florida Court also pointed out that the procedure utilized by the State of Florida to condemn the entire contents of the bookstore was deficient. Three exhibits had been presented to the Trial Court and were used to condemn the entire contents of the bookstore on the theory that they were "representative".

The Court rejected this approach:

"Unless a defendant is willing to stipulate that particular exhibits are absolutely representative of the stock offered the public, one copy of each item sought to be suppressed must be entered into evidence." *Mitchum v. Florida ex re. Schaub, supra.*

In rejecting the contention that one publication might be used to judge others not in evidence, the Court relied upon the Supreme Court's decision in *Marcus v. Search Warrant*, 367 U.S. 717 (1961). In that case, Missouri procedures for suppressing alleged obscenity were found to lack the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. The Court discussed the reliance by the Missouri Supreme Court on the Supreme Court's decision in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and found such reliance to be misplaced:

> "The differences in the procedures under the New York statute upheld in that case and the Missouri procedures as applied here are marked. They amount to the distinction between 'a "limited injunctive remedy," under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene,' *Kingsley Books, supra* (354 U.S. at 437), and a scheme which in operation inhibited the circulation of publications indiscriminately because of the absence of any such safeguards. *First*, the New York injunctive proceeding was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene. The court, in restraining distribution pending final judicial determination of the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place. *Second*, the restraints in *Kingsley Books*, both temporary and permanent, ran only against the named publication; no catchall restraint against the distribution of all 'obscene'

> material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation."

At this point, Footnote 28 was referred to and it cites the refusal of the Trial Court in *Kingsley Books, supra*, to allow the Defendants therein to do as the Appellees wish to do in their proceeding against Harem Book Store:

> "28. The trial judge in *Kingsley Books* refused to enjoin the distribution of future issues of the publication in question, stating: '[u]nless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer.' 208 Misc. 150, 168, 169, 142 NYS 2d 735, 751. Cf. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625." *Marcus v. Search Warrant, supra*, at 735.

Thereafter, the Court pointed out other differences between the procedure in *Kingsley Books, Inc. v. Brown, supra*, and the Missouri procedure which are also relevant to the Georgia procedure:

> "*Third*, *Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. This Court expressly noted there that the State was not attempting to punish the distributors for disobedience of any interim order entered before hearing. The Court pointed out that

> New York might well construe its own law as not imposing any punishment for violation of an interim order were the book found not obscene after due trial. 354 U.S. at 443, note 2. But there is no doubt that an effective restraint – indeed the most effective restraint possible – was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor." *Marcus v. Search Warrant, supra,* at 735, 7356.

More recent cases have been consistent with the theory espoused by Appellees herein. In *State of Indiana ex rel Thomas J. Blee v. Mohney Enterprises, et al.*, 289 N.E. 2d 519 (Court of Appeals of Indiana), Petition to Transfer to the Supreme Court of Indiana denied May 14, 1973, the approach of Appellees Slaton and McAuliffe herein was rejected by the highest Courts of Indiana. In that case Blee had sought to enjoin the operation of an adult bookstore, operated by Mohney, as a nuisance. The trial court found for Mohney and Blee, on behalf of the State of Indiana, appealed.

Blee had contended that an Indiana statute deeming any building or place used for the purpose of lewdness, assignation or prostitution a nuisance applied to the operation of a retail bookstore selling allegedly obscene materials. He also had alleged that such operation constitutes a public nuisance enjoinable by a private citizen under I.C. 1971, 34-1-52-1; Ind. Ann. Stat. §2-505 (Burns 1967) which reads:

> "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the

> comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

Blee introduced into evidence several exhibits consisting of materials he and others had purchased at the bookstore. The Court, as had the trial court, did not pass on the contention that these materials were obscene.

The Court pointed out that what Blee sought to enjoin "is the dissemination by an adult bookstore, of *any* printed materials whatsoever, in Allen County" and that he did not seek to prohibit only the dissemination of specific, identifiable items.

The Court stated that any discussion of the issues tendered by Blee must be preceded by a determination whether such injunctive relief would be violation of the First Amendment to the Constitution of the United States.

After quoting *Roth v. United States*, 354 U.S. 476 (1957) and *Redrup v. New York*, 386 U.S. 767 (1967), the Court stated:

> "None of the above standards is broad enough to prohibit dissemination of materials which have not yet been printed.
>
> This decision must rest upon the firmly established principle reiterated in *Organization for a Better Austin v. Keefe* (1971), 402 U.S. 415, that an "injunction, so far as it imposes prior restraint on First Amendment rights." [And it is impermissible where it] operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature of 'any kind' . . . "

The requested injunction would be an impermissible prior restraint and the trial court's denial thereof was proper. We therefore do not reach appellant's other contentions.

Judgment affirmed."

Nor may the Defendants herein be heard to say that the relief that they feel themselves entitled to in the suit sought to be enjoined herein is any different in substance from that described above. They seek, not a determination that certain named publications are obscene in the constitutional sense, but instead, they make demands for:

"1. Summons and an appropriate order for service of summons issued, and of all rules and orders.

2. For an interlocutory injunction:

(a) For injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store in and on the premises at No. 2979 Campbellton Road, S.W., in the City of Atlanta, Fulton County, Georgia, by any person.

(b) For an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed.

3. That a Rule Nisi be issued instanter requiring the defendants named herein to show cause why the prayers of this complaint should not be granted."

The conclusion is inescapable that Appellees are engaged in a concerted action to impose a total and complete prior restraint upon the dissemination of *any* publications or materials by the Appellants without regard to the effect upon protected speech and the rights of the citizens of Alabama and of the United States to purchase materials presumed to be protected by the *First Amendment.*

The United States Supreme Court in the case of *Paris Adult Theatre I v. Slaton, et al,* 413 U.S. 49, (1973), held that a procedure which sought to condemn as obscene a single named film comported with constitutional requirements as the same procedure was applied in that case provided, the Court said, that the definition of obscene was not otherwise void for vagueness (the so-called *Roth-Memoirs* test) and incorporated by authoritative judicial construction or legislative enactment the standards set forth in *Miller v. California,* supra. In fact, including footnote 4, the majority of the Court suggests that his procedure is emanately fair when undertaken in the context therein prior to the institution of any criminal proceedings, and that the procedure would be even more fair if the disseminator had an opportunity to question the obscenity of the materials in a declaratory judgment forum prior to dissemination. The language of the decision and the footnote makes it clear that the Court was examining the Georgia procedure as it related to the prohibition of a specific film and/or films, and not to a general total and complete restraint on all films, whether first determined to be obscene or not.

In fact, this Court suggests that all press materials are presumptively protected until there is a judicial determination of obscenity in the opinion of the majority in *Roaden v.*

Kentucky, supra. In this case we are dealing with an Alabama statute which authorizes, independent of any criminal proceeding, the closing of a bookstore or theatre as a public nuisance. If such is allowed to occur, then those who disseminate and exhibit adult materials would have to engage in the kind of "self-censorship" that would result in a "chilling of speech" that would ultimately have the effect of depriving adults of our society from access to non-obscene books which deal candidly with the subject of sex – a mysterious and powerful force in society.

Thus, we think the special circumstances exist that justify this Court confining the principles of *Younger v. Harris*, supra and *Samuels v. Mackell*, supra to the specific holdings in those cases, and this Court should not permit the doctrine to be extended to encompass the category of proceedings which relate to State imposition of civil sanctions to defeat the jurisdiction of the federal forum to litigate federal constitutional rights.

The procedures sought to be utilized by Appellees herein are being utilized to close a bookstore and theatre without regard to its contents and thereby prevent further dissemination at that location of any publication to anybody, by any person.

Clearly, this impermissible prior restraint justifies relief in a federal forum when sought by a proper party. *Zwickler v. Koota*, 389 U.S. 241, 19 L.Ed.2d 444 (1967).

An amusing comment on this Younger problem was addressed by Judge Aldersit, concurring in *Roy v. Jones*, CA-3 (8/28, 1973) 42 LW 2158, wherein he stated as follows:

> "The fundamental equitable concepts of *Younger* must never be subordinated. Thus, one piece of the *Younger* factual complex must not become the

> subject of controlling emphasis to the exclusion of the important legal principles constituting the rationale of the case. An example of this is the suggestion that the root premises of *Younger* do not lie where there is no on-going State proceeding. While the contempor-enity [sic] of the State action may indeed be extremely important, this is but one factor and this one factor must not be considered in vacuo ... if the presence of an on-going State proceeding is critical, so is the necessity of proving entitlement to an immediate injunction. So understood, there is a delightful 'Catch-22' quality about it all:
>
> "Plaintiff: Aha, you can't apply *Younger* because there is no on-going State proceeding ...
>
> "Defendant: Aha to you Sir; if there is no on-going State proceeding then why do you need an injunction? What's there to enjoin? ..."

CONCLUSION

The three-judge district court was incorrect in applying the *Younger v. Harris* and *Samuels v. Mackell* considerations to the Appellants' Complaint and Petition for Injunctive and Declaratory Relief because there was no criminal prosecution involved. The reliance upon *Palaio v. McAuliffe* was misplaced as that decision's "civil as basically enforcement of a criminal statute" rationale is clearly erroneous. Even assuming that the comity considerations do apply the threat of the closing of a business provides the necessary special circumstances and irreparable injury to support injunctive and declaratory relief against the enforcement of statutes authorizing an impermissible prior restraint upon the distribution of materials conceded to be entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States.

This Court should reverse the dismissal of Appellants' action and direct the three-judge district court to proceed to a determination on Appellants' Constitutional claims.

Repsectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

GENERAL CORPORATION, FIRST AMENDMENT FOUNDATION, INC., and CINEMA THEATRE OF HUNTSVILLE, INC.,

Plaintiffs

v.

EUGENE SWEETON, CHARLES H. YOUNGER, JOHN D. SNODGRASS, and CITY OF HUNTSVILLE,

Defendants

MTM, INC., an Alabama corporation; and MOBILE BOOKMART, INC., an Alabama corporation,

Plaintiffs

Civil Action No. 73-194-NE

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,

Defendants

Civil Action No. 73-427-S

Before RIVES, Circuit Judge, and McFADDEN and POINTER, District Judges.

POINTER, District Judge:

Positing jurisdiction under 28 U.S.C. §§ 1343(3) and 2201, plaintiffs filed these actions under 42 U.S.C. § 1983, seeking injunctive and declaratory relief from state court orders, entered pursuant to Alabama nuisance statutes, Alabama Code, Title 7, §§ 1091-1108[1], enjoining the operation of several theatres and book stores. These two cases were consolidated pursuant to Rule 42, F.R.C.P. A three-judge court was constituted to hear the consolidated cases, which are now submitted for decision on the merits and on motions to dismiss.

At the outset this Court must determine the propriety of federal intervention in state court proceedings in these cases. Principles of equity, comity and federalism dictate that state court proceedings remain free from federal court intervention, except in cases where plaintiff can show the existence of "special equities" that justify intervention.[2] *Younger v.*

[1] These statutes were designed to deal with places of "lewdness, assignation, or prostitution." Defendants herein have used these statutes to deal with places where obscene material is allegedly shown or distributed.

[2] We decline to await the Supreme Court's decision on the appeal from *Pursue Ltd. v. Huffman*, _____F.2d_____ (W.D. Ohio 1973, C72-432, Apr. 20, 1973). The *Younger* problem was not dealt with by the District Court in that case, presumably due to the lack of identicality of parties in the state and federal cases. Nor do we consider the Supreme Court's summary remands on June 25, 1973, of a number of cases, including *Grove Press, Inc. v. Bailey*, 318 F. Supp. 244 (N.D. Ala. 1970) and *Spivak v. Shriver*, 315 F. Supp. 695 (M.D. Tenn. 1970), for "further consideration in light of *Miller v. California* _____ U.S. _____ (1973)" etc., without mentioning *Younger*, as overruling *Younger*.

Harris, 401 U.S. 37 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971). The *Younger* case and its progeny can be considered as merely restating traditional principles applicable to both civil and criminal cases. 401 U.S. at 43-45; *Lynch v. Snepp*, 472 F.2d 769 (C.A.4, 1973). The Fifth Circuit has not yet been squarely faced with the question of whether or not *Younger applies to purely civil proceedings; however, it has found Younger* applicable to matters which, though labelled civil, have significant implications for a state's enforcement of its criminal laws. *Duke v. Texas*, No. 71-2845 (C.A.5, April 20, 1973); *Palaio v. McAuliffe*, 466 F.2d 1230 (C.A.5, 1972). See *American Radio Ass'n v. Mobile Steamship Ass'n*, _____F.2d_____ (C.A.5, No. 72-3803; August 22, 1973). *Cf. Hobbs. v. Thompson*, 448 F.2d 456 (C.A.5, 1971). Other circuits have indicated that *Younger* does apply to civil matters. *Cousins v. Wigoda*, 463 F.2d 603 (C.A.7, 1972), *application for stay denied* 409 U.S. 1201 (Rehnquist, Circuit Justice); *Lynch v. Snepp, supra*. We need not now reach this question, since we conclude that the state proceedings here in question complement, or serve as a substitute for, the criminal laws of the state.[3]

What then does *Younger require? As stated by the* Supreme Court in the more recent case of *Mitchum v. Foster*, 407 U.S. 225, 230 (1972):

> In *Younger*, this Court emphatically reaffirmed "the fundamental policy against federal interference

[3] Compare the situation in *80 Drive-in v. Baxley*, 468 F.2d 611 (C.A.5, 1972), wherein the Fifth Circuit had before it a matter which it indicated was purely civil in nature. That matter involved Alabama's general nuisance statutes, Alabama Code, Title 7, Article 1 of Chapter 31, whereas we are now faced with an application of Article 2 of Chapter 31, dealing with places of lewdness, assignation and prostitution as public nuisances. Note that § 1107 of Article 2 requires certain state officials to institute nuisance proceedings where nuisance has been established in a criminal proceeding, a criminal verdict of guilty being conclusive in the civil action. *See also, Ridge v. State*, 206 Ala. 349, 89 So. 742 (1921).

with state criminal prosecutions." 401 U.S., at 46. It made clear that even "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." 401 U.S., at 54. At the same time, however, the Court clearly left room for federal injunctive intervention in a pending state court prosecution in certain exceptional circumstances – where irreparable injury is "both great and immediate," 401 U.S., at 46, where the state law is "flagrantly and patently violative of express constitutional prohibitions," 401 U.S., at 53, or where there is a showing of "bad faith, harrassment, or . . .other unusual circumstances that would call for equitable relief." 401 U.S., at 54.

In the present cases the plaintiffs have failed to demonstrate that the state court actions have been instituted in bad faith or to harrass. Compare *Cameron v. Johnston*, 390 U.S. 611 (1968) with *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Plaintiffs are not being threatened with multiple prosecutions – indeed, the essence of their complaint here is that they are not. *Cf. Younger v. Harris*, 401 U.S. at 47 ("the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution").

There is an insufficient showing that plaintiffs will suffer irreparable injury if consigned to their state court remedies. In Alabama permanent injunctions are appealable, and temporary injunctions may be made appealable by appropriate motions, and both types of appeals are given expedited, preferential treatment by statute.[4]

[4] See Alabama Code, Title 7, §§ 757, 1057 (Recomp. 1958). The plaintiffs in the federal court cases have had, have, or can have viable appellate rights (though it appears that at least two of the plaintiffs have elected to let the time for appeal expire).

There is a question as to whether the Alabama nuisance statutes here in question are "'flagrantly and patently violative of express constitutional prohibitions.'" *Mitchum v. Foster, supra.* However, it is quite possible that the Alabama Supreme Court might construe these statutes as inapplicable to motion picture theatres and book stores, obviating any federal constitutional question.[5] If a constitutional question remains after the statutes have been authoritatively construed, such question can be decided by the Alabama Supreme Court upon the same appeal.

On balance, we conclude that the plaintiffs have failed to show any of the exeptional circumstances required by *Younger* and that accordingly it is the duty of this Court to dismiss these cases.[6] Dismissal is, of course, without prejudice to any rights plaintiffs may have in the Alabama courts; and we intimate no opinion as to the merits of these cases.

[5] Note that the Georgia statute involved in *Speight v. Slaton*, 356 F.Supp. 1101 (N.D.Ga. 1973), on appeal to the Supreme Court as #72-1557, is specifically directed at obscenity and, unlike the Alabama statute, calls for destruction of the materials, even those which would be held not obscene. In *Speight* the state admitted that not all the materials sought to be seized were legally obscene; in the present case the posture of governmental officials apparently is that each and every film or book is legally obscene. Moreover, in *Speight* there was apparently "no way to construe abatement of a public nuisance to avoid the [claimed] constitutional infirmity" and the Georgia Supreme Court "may have already approved of the use of the public nuisance approach to closing down activities involving 'obscene' materials." (Judge Morgan dissenting in *Speight*, 356 F.Supp. at 1107, 1108.) We have not been advised of any like approval by the Alabama Supreme Court. Due to the differences in the cases it is doubtful that a reversal by the Supreme Court in *Speight* would be controlling on the cases here.

[6] We note our conclusion that these cases require the action of a three-judge court, 28 U.S.C. §§ 2281, 2284, even where the only action taken is dismissal for reasons of guilty, comity and federalism.

For the foregoing reasons, it is ORDERED, ADJUDGED and DECREED that the above-styled cases be, and the same hereby are, dismissed, each party to bear his own costs.

DONE, this the 18th day of October, 1973.

/s/Richard T. Riva
United States Circuit Judge

/s/Sam C. Pointer, Jr.
United States District Judge

/s/Frank McFadden
United States District Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,

Plaintiffs

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,

Defendants

Civil Action No. 73-427-S

NOTICE OF APPEAL

Now come the Plaintiffs, MTM, Inc., an Alabama Corporation, and Mobile Bookmart, Inc., an Alabama Corporation, in the above-styled cause, and gives notice of appeal from the judgment and order of the Honorable Richard T. Rives, District Judge, the Honorable Frank H. McFadden, District Judge, and the Honorable Sam C. Pointer, Jr., District Judge, rendered the 18th day of October, 1973, to the United States Supreme Court.

ROBERT EUGENE SMITH and
FERRIS S. RITCHEY, JR.

ERRATA SHEET

MTM, Inc. and Mobil Bookmart, Inc.

v.

Wm. J. BAXLEY, et al.

Appendix and Jurisdictional Statement

Photograph of Original Document Below

(Exhibit B, Pages A7 and A8.)

Dates were inadvertently omitted from these Pages.

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U.S. COURT OF APPEALS
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NOV 16 '73
NEW ORLEANS, LA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,

Plaintiffs

vs.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,

Defendants

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
NOV 9 1973
WILLIAM E. DAVIS
CLERK U.S. DISTRICT COURT

CIVIL ACTION

NO. 73-427-S

NOTICE OF APPEAL

Now come the Plaintiffs, MTM, Inc., an Alabama Corporation, and Mobile Bookmart, Inc., an Alabama Corporation, in the above-styled cause, and gives notice of appeal from the judgment and order of the Honorable Richard T. Rives, District Judge, the Honorable Frank H. McFaddon, District Judge, and the Honorable Sam C. Pointer, Jr., District Judge, rendered the 18th day of October, 1973, to the United States Supreme Court.

ROBERT EUGENE SMITH and
FERRIS S. RITCHEY, JR.

BY: _____
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Birmingham, Alabama 35209
201/870-4091

A True Copy
ATTEST: WILLIAM E. DAVIS, CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
By: _____
Deputy Clerk

(205) 595-6191

APPENDIX "B"

By: /s/ Ferris S. Ritchey, Jr.
Ferris S. Ritchey, Jr.
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APPENDIX "C"

FIRST, FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, Alabama Code, Title 7, Sec. 5. 1091-1108

FIRST AMENDMENT, CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 374(1). **Title of chapter.** – This chapter shall be known as the Alabama Law on (Obscenity and may be referred to by that designation. 1961. p. 1310. § 1 signed Sept. 8, 1961.)

§ 374(2). **Purpose of chapter.** – The spread of obscene publications, during the past several years, has become a matter of increasingly grave concern to the people of this state. The elimination of this evil and the consequent protection of the citizens and residents of this state against such publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing public prosecutors both with the speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within this state. (1961, p. 1310, § 2, appvd. Sept. 8, 1961.)

§ 374(3). **Definitions.** – The following words, terms and phrases used in this chapter shall, for the purpose of this chapter, have the meaning respectively ascribed to them in this section:

"Mailable matter" means (a) printed or written matter or material having second class mailing privileges under the laws of the United States, or (b) any other printed or written matter or material which has not been determined to be nonmailable under thy laws of the United States.

"Obscene" means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

"Person" means any individual, partnership, firm, association, corporation or other legal entity.

"Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story book, or other printed or written matter, but does not include written or printed matter or material used by or in any religious, scientific or educational institution. (1961, p. 1310, § 3, appvd. Sept. 8, 1961.)

§ 374(4). **Importation, sale or possession of obscene printed or written matter; penalties.** – (1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute or to give away or offer to give away, any obscene printed or writter matter or material, *other than mailable matter*, or any mailable matter known by such person to have been judicially found to be obscene under this charter, shall be guilty of a misdemeanor and, upon

conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of court.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, and sentenced to hard labor for the county, for not more than six months, and may be fined not more than five hundred dollars for each offense, or be imprisoned and fined in the discretion of the court. (1961, p. 1311, § 2 appvd. Sept. 8, 1961.)

§374(5). Equitable action to adjudicate obscenity of mailable matter imported, sold or possessed. – Whenever the solicitor in any judicial circuit or county solicitor has reasonable cause to believe that any person, with knowledge of its contents, is (1) engaged in sending or causing to be sent, bringing or causing to be brought, into this state for sale or commercial distribution, or is (2) in this state, preparing, selling, exhibiting or commercially distributing or giving away, or offering to give away, or has in his possession with intent to sell, or commercially distribute, or to exhibit or give away or offer to give away, any obscene mailable matter, the solicitor for the judicial circuit or county into which such mailable matter is sent or caused to be sent, brought or caused to be brought or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, may institute an action in equity in the circuit court or any court having equity jurisdiction of the affected county for an adjudication of the obscenity of the mailable matter (1961), p. 1311, §5, appvd. Sept. 8, 1961.)

§ 374(6). **Same; complaint.** – The action authorized by section 374(5) shall be commenced by the filing of a complaint to which shall be attached, as an exhibit, a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description; (b) allege its obscene nature; (c) designate as respondents and list the names and addresses, as known, of its author, publisher and any other person sending or causing it to be sent, bringing or causing it to be brought into this state for sale or commercial distribution, and of any person in this state preparing, selling, exhibiting or commercially distributing it, or giving it away or offering to give it away or processing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away; (d) pray for an adjudication that it is obscene; (e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale commercial distribution, or in this state preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away, and (f) pray for its surrender, seizure and destruction. (1961, p. 1312, § 6 appvd. Sept. 8, 1961.)

§ 374(7). **Same; dismissal; temporary injunction; order to show cause; service of process.** – Upon filing of the complaint, described in section 374(6), the solicitor or register of the court shall present the same, including the exhibit thereto, as soon as practicable to the court for the examination. If there is no probable cause to believe that the mailable matter described in the complaint is obscene, the court shall dismiss the complaint. If the Court finds probable cause to believe such matter to be obscene it may forthwith issue an order temporarily restraining and prohibiting the sale or distribution of such matter and it shall issue an order to

show cause why the same shall not be adjudicated obscene, returnable not less than ten days after its service, directed against the mailable matter by name or description and directing the service of a copy thereof, together with a copy of the complaint, upon such mailable matter and upon each of the respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial office as shown therein. Service of such order may be made in any manner provided by law and in case of mailable matter published or edited outside the state of Alabama and of any nonresident respondent, by registered or certified mail directed to the mailable matter or the respondent to be deemed to be prima facie evidence of service of such order upon the mailable matter or any respondent for the purposes of this section. (1961, p. 1312, § 7, appvd. Sept. 8, 1961.)

§ 374(8). **Same; appearance, answer and trial date; order on default.** – (1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may appear and file defensive pleadings.

(2) The court may permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the court may forthwith determine whether the mailable matter is obscene and enter an appropriate order.

(4) Upon the expiration of the time for filing answer and other defenses by the mailable matter and other respondents, the court shall set a date for the trial of the case. (1961, p. 1313, § 8, appvd. Sept. 8, 1961.)

§ 374(9). **Same; speedy trials; rules of procedure.** – The public interest requires that all actions prescribed by this chapter, other than criminal actions under section 374(4), be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements,

including due process, freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions except that the time limits therein concerning notice of trial, the presentation of evidence, and other proceedings may be shortened, if the party or parties affected or concerned have notice thereof and the court finds the same to be in the public interest. (1961, p. 1313, § 9, appvd. Sept. 8, 1961.)

§ 374(10). **Same; decree; enforcement.** – In the event the court finds the mailable matter to be obscene, it shall enter a decree to such effect and may, in such decree or in subsequent orders of enforcement thereof.

(a) enter a permanent injunction against any respondent, prohibiting him from doing or continuing to do any thing condemned by this chapter;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the court may find to be reasonable.

(c) direct all sheriffs in the state to seize and destroy all such obscene mailable matter in the possession or under the control of any respondent who shall fail to comply with the court's order.

(d) enter any other and appropriate orders to effectuate the decree or injunction (1961, p. 1313, § 10 appvd. Sept. 8, 1961.

§ 374(11). **Same; contents and effect of objections; service of copies of orders.** – Every order granting an injunction shall set forth the reason for its issuance; shall be specific in terms and describe in reasonable detail and not by reference to the complaint, the act or acts restrained and shall be binding only upon the respondents, to the action and upon those persons in active concert or participation by contract or arrangement with such respondents who receive actual notice of the order by personal service or otherwise.

Copies of the order of the court, finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all respondents named in the complaint and in the manner as provided in section 374(7) of this chapter. (1961, p. 1314, § 11, appvd. Sept. 8, 1961.

§ 374(12). **Importation, sale or possession of mailable matter found obscene.** – Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this state for sale or commercial distribution, or which in this state is sold, exhibited or commercially distributed, given away or offered to be given away or offered to be given away by any person, with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of section 374(4) of this chapter. (1961, p. 1314, § 12, appvd. Sept. 8, 1961.)

§ 374(13).**Violation of injunction.** – Any respondent or any person in active concert or participation by contract or agreement with such respondent, with actual notice by personal service or otherwise, of any injunction or restraining order entered pursuant to sections 374(10) and 374(11) of this chapter, and who shall disobey any of the provisions thereof, shall be guilty of contempt of court. (1961, p. 1314, § 13, appvd. Sept. 8, 1961.)

§ 374(14).**Extradition of person in another state charged with continuing violation.** – In all cases in which a court has entered its decree pursuant to section 374(10) that the mailable matter in question is obscene, and a charge of continuing violation is thereafter brought against a person who is a respondent to such decree, who cannot be found in this state, the governor shall, unless such person shall have appealed from such decree and such appeal has not been finally determined, demand his extradition from the executive authority of the state in which such person may be found

pursuant to the laws of this state. (1961, p. 1315, § 14, appvd. Sept. 8, 1961.)

§ 374(15). **Presumption from possession of obscene matter; burden of proof.**– The possession of any three of the things enumerated in section 374(4) of this chapter (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor. (1961, p. 1315, § 15, appvd. Sept. 8, 1961.)

§ 374(16). **Nonresidents and others importing obscene matter submit to jurisdiction of courts.** – In order to protect the morals and general welfare of the citizens and residents of this state against obscene printed or written matter or material originating outside of this state, it is the purpose of this section to subject to the jurisdiction of the courts of this state those persons, including non-residents, who are responsible for the importation of such matter into this state and, by such act, submit themselves to the jurisdiction of the court of this state and any action authorized by section 374(5) of this chapter. (1961, p. 1315, § 16, appvd. Sept. 8, 1961.)

§ 1091. **(9280)** Definitions.–For the purpose of this article, the terms place, person, nuisance are defined as follows: Place shall include any building, erection, or place or any separate part or portion thereof or the ground itself; person shall include any individual, corporation, association, partnership, trustee, lessee, agent or assignee; nuisance shall mean any place as above defined in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting or maintaining any such place for any such purpose. (1919, p. 52.)

• • •

§ 1092. **(9281) Maintaining nuisance; definition of.**–Any person who shall use, occupy, establish, or conduct a nuisance as defined in the preceding section, or aid or abet therein, and the owner, agent or lessee of any interest in any such nuisance, together with the person employed or in control of any such nuisance by any such owner, agent or lessee, all for the purpose of this article, be guilty of maintaining a nuisance and shall be enjoined as hereinafter provided. (1919, p. 52.)

§ 1093. **(9282) Injunction of nuisance.**–Whenever a nuisance exists, the attorney-general of the state, or the solicitor, his assistant or deputy, or any prosecuting attorney in the county, or any citizen or citizens, may bring an action in equity in the name of the state of Alabama, upon the relation of such attorney-general, or such other officer or person to abate such nuisance and to perpetually enjoin the person or persons maintaining the same from further maintenance thereof. (1919, p. 52.)

• • •

§ 1094. **(9283) When injunction issued before hearing.**–No injunction or restraing order shall be issued before hearing in any action brought by a citizen or citizens under the provisions of this article, unless such citizen or citizens have made bond in such sum as may be fixed by the judge to whom the application for such injunction or restraining order is made, such bond to be approved by the register of the circuit court of the county in which the proceeding is filed and to be payable and conditioned as provided by section 1043 of this title. (1919, p. 52.)

§ 1095. **(9284) Complaint, filing of; temporary injunction.**–Such action shall be brought in the circuit court of the county in which the property is located. At or before the commencement of the action a verified complaint alleging the facts constituting the nuisance shall be filed in the office of the probate judge of the county, together with a notice of

the pendency of the action, containing the name of the court, the names of the parties, the object of the action, containing the name of the court, the names of the parties, the object of the action, and a brief description of the property affected thereby. The probate judge shall be paid the usual fee for recording such lis pendens, who shall immediately record such notice. After the filing of the complaint, application for a temporary injunction may be made to the circuit court or a judge thereof or any judge authorized by the laws of the state to make an order for a preliminary injunction, who shall grant a hearing thereon within ten days thereafter. (1919, p. 52.)

* * *

§ 1096. **(9285) Restraining order, inventory of property.**—Where such application for a temporary injunction has been made, the court or judge thereof may, on the application of the complainant, issue an ex parte restraining order, restraining the respondents and all other persons from the moving or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction, and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of said order with any person in charge of said place or residing therein, or by posting a copy thereof in a conspicuous place at, or upon one or more of the principal doors or entrances to such places, or the judge may order it served on the parties defendant. The officer serving such restraining order shall forthwith make and return into the court, an inventory of the personal property and contents situated in and used in conducting and maintaining such nuisance. (1919, p. 52.)

§ 1097. **(9286) Contempt of court, what constitutes.**—Any violation of such restraining order shall be a contempt of court, and where such order is so posted, mutilation or removal thereof, while the same remains in force, shall be a contempt of court. (1919, p. 52.)

§ 1098. **(9287) Service of complaint, when writ granted.**—A copy of the complaint together with a notice of the time and place of the hearing of the application for a temporary injunction shall be served upon the respondents at least five days before such hearing. If the hearing be then continued at the instance of any respondent, the temporary writ as prayed shall be granted as a matter of course. (1919, p. 52.)

§ 1099. **(9288) Answer of respondents.**—Each respondent so notified shall serve upon the complainant or the attorney filing the bill, a verified answer on or before the date fixed in said notice for said hearing and such answer shall be filed with the register of the court wherein such cause is triable, but the court or judge may allow additional time for answering, providing such extension of time shall not prevent the issuing of said temporary writ as prayed for. (1919, p. 52.)

§ 1100. **(9289) Final decree, when granted.**—If upon the final hearing, the allegations be sustained to the satisfaction of the court or judge, the court or judge shall make a decreee restraining the respondents and all other person or persons from continuing the nuisance. When any injunction has been granted, it shall be binding on the respondents throughout the county. Any violation thereof shall be contempt of court and punished as hereinafter provided. (1919, p. 52.)

§ 1101. **(9290) Closing of premises, pending final decision.**—If on the hearing for a temporary injunction, it shall further appear that the person owning, in control, or in charge of the nuisance so enjoined has received five days' notice of the hearing, and unless such person shall show to the satisfaction of the court or judge that the nuisance complained of has been abated, the court or judge shall issue an order closing the place against its use for any purpose until final decision shall be rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or if not issued, shall include such an order restraining, for such period the removal or interference with the personal

property and contents located thereat or therein as hereinbefore provided, and such restraining order shall be served and the inventory of such property shall be made and filed as hereinbefore provided. (1919, p. 52.)

• • •

§ 1103. **(9292) Trial of action; evidence; judgment.**—The action when brought shall have precedence over all other cases except injunctions. In such action, evidence of the general reputation of the place or any admission or finding of guilty of any person under the original laws against prostitution, lewdness, or assignation, at any such place shall be admissible for the purpose of proving the existence of said nuisance and shall be prima facie evidence of such nuisance and of knowledge of, and acquiescence and participation therein, on the part of the person or persons charged with maintaining such nuisance as herein defined. If the complaint is filed for the state by a citizen of the county, it shall not be dismissed except upon a sworn statement of the complainant or his personal representative or agent, and his attorney or of the officer filing the complaint, setting forth the reasons why the action should be dismissed and the dismissal be approved by the attorney filing the bill in writing or in open court. If the court or judge is of the opinion that the action ought not to be dismissed, he may direct the solicitor to prosecute such action to judgment at the expense of the county, and if the action is continued more than once, any person who is a citizen of the county, or the attorney-general or the solicitor may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed against such person. If the existence of the nuisance be established upon the trial, a judgment shall be entered which shall perpetually enjoin the respondents and any other person or persons from further maintaining the nuisance at

the place complained of and the respondents from maintaining such nuisance elsewhere in the county. (1919, p. 52.)

• • •

§ 1107. **(9296) Nuisance established in criminal action; proceedings under this article.**—In case the existence of such nuisance is established in a criminal proceeding in a court not having equitable jurisdiction, the solicitor or prosecuting officer shall proceed promptly under this article to enforce the provisions and penalties thereof, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against the defendant as to the existence of the nuisance. The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement including the complainant's costs, or so much of such proceeds as may be necessary, except as hereinafter provided. (1919, p. 52.)

§ 1108. **(9297) Contempt proceedings or violation of closing order.**—In case of the violation of any injunction or closing order granted under the provisions of this article, or of any restraining order or the commission of any contempt of court in proceedings under this article, the court, or the judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the register of the court a complaint under oath, setting out and alleging facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested; he may be released on bond, pending the hearing, to be fixed by the judge. The trial may be had upon affidavits, or either party may demand the production and oral examination of witnesses. A party found guilty of contempt, under the provisions of this article, shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars, or by imprisonment in

the county jail not less than one nor more than three months, or by both such fine and imprisonment. (1919, p. 52.)

APPENDIX "D"

CIRCUIT COURT, TENTH JUDICIAL
CIRCUIT OF ALABAMA
EQUITY DIVISION

STATE OF ALABAMA, ETC.
Complainant

v.

MTM, INC., a corp., et al
Respondents

CASE NO. 177-199

ORDER UPON PRAYER FOR TEMPORARY INJUNCTION

This cause came on to be heard and was submitted upon prayer for a temporary injunction addressed to Respondents as set forth in the Bill of Complaint. The allegations upon which the prayers for relief are based are lengthy and diverse but the apparent purpose thereof is to establish the perpetration of a nuisance by Respondents in their operation of a motion picture theatre and bookstore wherein allegedly lewd and obscene motion pictures and printed publications are offered, by advertisement, to the general public or a portion thereof. The temporary relief sought is (1) the enjoining of Respondents from further maintenance of the said alleged nuisance, (2) The closing of the theatre and bookstore pendente lite, and (3) the enjoining of the removal from the said premises of any personal property therein, or the interference therewith.

The Court finds that, as alleged, there have been numerous and repeated past violations of the laws and statutes of the State of Alabama and the ordinances of the City of Birmingham, Alabama, which govern, control

and /or apply to the operation of the said motion picture theatre and bookstore, all in a manner such as to constitute a nuisance.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

ONE: Respondents, their servants, agents or employees, are each hereby, separately and severally and conjointly temporarily enjoined from further maintaining such nuisance and any further maintenance thereof or any violation of this Order shall constitute an open contempt of this Court and its solemn Order.

TWO: Said Respondents are further enjoined from removing from the premises of the Pussycat Adult Theatre and Bookstore any and all personal property therein, or the interference therewith.

THREE: The foregoing restraining orders shall continue in effect to abide the further orders and decrees of this Court.

DONE and ORDERED this the 29th day of May, 1973.

Circuit Judge in Equity Sitting

cc: Hon. Herbert Jenkins
Hon. Ferris Ritchey

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

AIRWAYS THEATER, INC. and
SOUTHLAND THEATRES, INC.,
Plaintiffs

v.

PHIL M. CANALE, District Attorney General; DAVID M. PACK, Attorney General of Tennessee; and WINFIELD DUNN, Governor of the State of Tennessee,

Defendants

CIVIL C-73-262

PER CURIAM

Before: FREDERICK PIERCE LIVELY, Circuit Judge; BAILEY BROWN, Chief District Judge and ROBERT M. McRAE, JR., District Judge.

Plaintiffs Airways Theater, Inc. and Southland Theatres, Inc., operators of "adult" motion picture theaters in Memphis, Tennessee, challenge the constitutionality of Tennessee's obscenity statute, T.C.A. § 39-3003 through 3008, and Tennessee's nuisance statute, T.C.A. § 23-301 et seq. Plaintiffs seek both declaratory and injunctive relief. Jurisdiction is based on 28 U.S.C. § 1343(3) and (4) and 28 U.S.C. § 2201. Since plaintiffs seek to enjoin state officers from enforcing allegedly unconstitutional statutes, a three-judge court has been convened. 28 U.S.C. § 2281.

Plaintiffs contend that the statutory definition of obscenity in § 39-3007 is vague and overbroad in the light of the requirement in *Miller v. California*, _____ U.S._____, 37 L.Ed. 2d 419 (1973), that the sexual conduct prohibited must be specifically defined. Plaintiffs also challenge the procedures established by the obscenity statute for obtaining temporary restraining orders or injunctions, contending that, properly construed, they allow such to be issued without a prior adversary hearing. The nuisance statute is challenged on the grounds that it is vague and overbroad and that it operates as a prior restraint without procedural safeguards.

Defendants rely on the threshold defenses that plaintiffs have not stated an actual controversy, that, as to plaintiff Southland, the existence of a criminal proceeding against it under the obscenity statute prevents the granting of any relief to it with respect to that statute, and that this Court should, applying the abstention doctrine, deny all relief to plaintiffs. Defendants further contend that in any event, properly construed, the involved statutes are constitutional.

We conclude that plaintiffs have stated an actual controversy, but that the existence of a criminal proceeding against plaintiff Southland, together with a proper application of the abstention doctrine, preclude this Court from granting either declaratory or injunctive relief as to the obscenity statute. We do, however, hold that Tennessee's nuisance statute is unconstitutional.

JUSTICIABILITY

We conclude that the facts alleged indicate that there is "a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality . . . ." *Golden v. Zwickler*, 394 U.S. 103 (1969). It is without question that there is an actual controversy as to plaintiff Southland involving the obscenity statute since subsequent to the filing

of this action, Southland was indicted in state court under that statute.[1]

Plaintiffs' other allegations also lead to the conclusion, although it is not without doubt, that there is an actual controversy as to plaintiff Southland involving the nuisance statute and as to plaintiff Airways involving both statutes in question. Plaintiffs have alleged that they are operators of "adult" motion picture theaters and that they have been exhibiting adult motion pictures and desire to continue doing so in a lawful manner. Tennessee's obscenity and nuisance[2] statutes are directed in part at such establishments. It is without dispute that defendant District Attorney General Canale made statements in the Memphis newspapers shortly before this action was filed which indicate that he intends to enforce the statutes in question. In addition, representatives of defendant Canale have at his direction recently attended movies at the Airways Theater. Since plaintiff Southland has been enjoined under this obscenity statute prior to the filing of this action, and subsequent to such filing has been indicted, it is reasonable to conclude in the light of defendant Canale's statements and his representatives' actions that both plaintiffs have "assert[ed] a sufficiently direct threat of personal detriment," *Doe v. Bolton*, 410 U.S. 179 (1973), both as to the obscenity statute and the nuisance statute.

YOUNGER v. HARRIS

Prior to the filing of this action, as indicated, two injunctions had been issued against plaintiff Southland in the

---

[1] Moreover, prior to the filing of this action, two injunctions had been issued against Southland in state Criminal Court pursuant to the obscenity statute.

[2] The nuisance statute was only recently amended to include lewdness and obscene or pornographic material.

Criminal Court of Shelby County, Tennessee pursuant to T.C.A. § 39-3003. Plaintiff Southland contends, however, that since these injunctions are civil in nature, *Younger v. Harris*, 401 U.S. 37 (1971) does not require that we dismiss this action. We need not reach the question of whether *Younger* proscribes interference in pending state civil actions, for after examining T.C.A. § 39-3003, pursuant to which the injunctions were issued, we conclude that the issuance of injunctions under that section is a first step in a process which looks toward the submission of an indictment to the grand jury, and thus § 39-3003[3] (including that part authorizing the issuance of injunctions) should be regarded as part of a criminal process.

Thus, there having been no allegations by Southland of harassment or bad faith prosecution, *Younger, supra*, requires that this Court not grant that plaintiff injunctive relief as to the obscenity statute and *Samuels v. Mackell*, 401 U.S. 66 (1971) likewise precludes declaratory relief.

ABSTENTION

The Supreme Court of Tennessee, as a result of the remand to it of cases by the Supreme Court of the United States, is presently considering the constitutionality of the Tennessee obscenity statute in the light of *Miller v. California*, ___ U.S. ___, 37 L.Ed. 2d 419 (1973). Although the

[3] §39-3005 also provides for injunctions, but looks not toward ultimate submission to the grand jury; rather, upon the obtaining of a permanent injunction, it looks to the seizure and destruction of obscene material.

Tennessee statute does not describe specific prohibited sexual conduct,[4] it is possible that the Tennessee Supreme Court might give it such a limiting construction, *e.g.*, as the Supreme Court of the United States construed a federal obscenity statute in *United States v. 12 200-Ft. Reels*, ___ U.S. ___, 37 L.Ed. 2d 500 n. 7 (1973). Similarly the question whether the obscenity statute, insofar as it establishes injunction procedures, can be constitutionally construed is also before the Tennessee Supreme Court. Thus, the doctrine of abstention requires that this Court refrain from granting either plaintiff injunctive or declaratory relief regarding the obscenity statute. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

CONSTITUIONALITY OF THE NUISANCE STATUTE

Since thery is no *Younger v. Harris* or abstention problem as to either plaintiff regarding the nuisance statute,[5] we now consider the constitutionality of that statute. We conclude that the statute is unconstitutional for at least two reasons. In the first place, among the definitions of nuisance in the statute is "any place in or upon which . . . possession of any material determined to be obscene or pornographic . . . [is] carried on or permitted . . . " "Place" is defined in the statute as "any building, room, enclosure or vehicle, or separate part or portion thereof or the ground itself." Thus, possession in one's home of material determined to be obscene or pornographic would clearly make that home a nuisance subject to abatement. Under *Stanley v. Georgia*, 394 U.S. 557

[4] The Tennessee obscenity statute (§39-3007) tracks the language of the Supreme Court in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

[5] It is not contended that there are any pending state actions against either plaintiff under the nuisance statute or that the constitutionality of that statute is challenged in any state court. Moreover, as will be seen, the statute is not subject to an interpretation that would allow it to pass constitutional muster.

(1969), the state's power to regulate obscenity "does not extend to mere possession by the individual in the privacy of his own home." 394 U.S. at 568.

Secondly, the nuisance statute also provides that "[a]ll furnishings, fixtures, equipment and stock, used in or in connection with the maintaining or conducting of a nuisance shall be subject to seizure, immediately upon detection by any law enforcement officer . . . ." Thus, once there is a determination of obscenity by a law enforcement officer, the seizure of the property may take place. In *Roaden v. Kentucky*, ___ U.S. ___, 37 L.Ed. 2d 757 (1973), the Supreme Court overturned a seizure of a film which "proceeded solely on a police officer's conclusions that the film was obscene." A magistrate had not been afforded an opportunity to "focus searchingly on the question of obscenity." 37 L.Ed. 2d 765-66. The Tennessee nuisance statute permits not only seizure of the film or other obscene material, conduct that was proscribed in *Roaden*, but also seizure of furnishings, fixtures and equipment used in connection therewith merely upon determination of obscenity by a law enforcement officer.

It results that plaintiffs' claim with respect to the unconstitutionality of the obscenity statute should be dismissed without prejudice. With respect to the nuisance statute, plaintiffs are entitled to a declaration of unconstitutionality; however, they are not entitled to an injunction against enforcement of such nuisance statute since they have not shown irreparable injury. *Zwickler v. Koota*, 389 U.S. 241 (1967).

Since the judgment to be entered will be somewhat unusual as to its content, it is requested that the parties prepare and submit such to this Court.

ENTER this 19th day of November, 1973.

Pierce Lively, Circuit Judge

Bailey Brown, Chief District Judge

Robert M. McRae, Jr., District Judge

Supreme Court, U. S.
FILED
SEP 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

APPENDIX OF APPELLANTS

ROBERT EUGENE SMITH, Esq.
2005-One Hundred Colony Sq.
Atlanta, Georgia 30361
GILBERT H. DEITCH, Esq.
2005-One Hundred Colony Sq.
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Attorneys for Appellants

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Filed January 16, 1974
Jurisdiction Noted March 18, 1974

THE PAUL M. HARROD COMPANY, BALTIMORE, MARYLAND 21234

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List of Relevant Docket Entries, MTM, Inc., et al v. William J. Baxley, et al, U.S. District Court, N.D. Alabama (S.D.), Civil Action No. 73-427.

1. May 3, 1973 – Complaint filed.

2. May 23, 1973 – Motion of defendant Herbert Jenkins, Jr. to dismiss the complaint filed, copies served by counsel.

3. May 25, 1973 – Motion of defendant William J. Baxley, Attorney General to dismiss complaint filed, copies served by counsel.

4. May 29, 1973 – Motion of defendant George C. Wallace, Governor of Alabama, to dismiss the complaint filed, copies served by counsel.

5. May 30, 1973 – Motion of defendant Earl C. Morgan to dismiss the complaint filed, copies served by counsel.

6. August 6, 1973 – Order of Hon. John R. Brown, Chief Judge, Fifth Circuit, designating the Hon. Richard T. Rives, United States Circuit Judge and the Hon. Sam C. Pointer, Jr., United States District Judge for the Northern District of Alabama, to serve with Judge McFadden as members of, and with him to constitute a Three-judge Panel to hear and determine this action, filed and entered, John R. Brown, cm to judges, dated August 1, 1973.

7. August 31, 1973 – Order dated August 23, 1973, that the Court is of the opinion that these cases contain common issues of law and fact and that they should, therefore, be consolidated pursuant to Rule 42, Fed. R. Civ. P., filed and entered, Richard T. Rives, Frank H. McFadden and Sam C. Pointer, Jr., cm. In re CA-73-194, General Corporation, et al. v. Eugene Sweeton, et al. and CA 73-427, MTM, Inc. an Alabama corporation, et al. v. William J. Baxley, et al.

8. October 18, 1973 – Order dismissing Civil Action No. 73-427 and CA 73-194 NE without prejudice to any rights plaintiffs may have in Alabama courts and each party to bear his own costs, filed and entered. Rives, Pointer, and McFadden, Judges, cm.

9. November 9, 1973 – Notice of Appeal to U.S. Supreme Court by Plaintiff from the order entered October 18, 1973, filed. Copies mailed.

10. March 25, 1974 – Copy of statement from U.S. Supreme Court of probable jurisdiction filed.

APPENDIX OF APPELLANTS

OCTOBER TERM, 1974

NO. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,

Appellants,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,

Appellees.

CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA
EQUITY DIVISION

STATE OF ALABAMA, ETC.,
Complaint,

v.

MTM, INC., a corp, et al
Respondents.

CASE NO. 177-199
APPENDIX A

ORDER UPON PRAYER FOR TEMPORARY INJUNCTION

This cause came on to be heard and was submitted upon prayer for a temporary injunction addressed to Respondents as set forth in the Bill of Complaint. The allegations upon which the prayers for relief are based are lengthy and diverse but the apparent purpose thereof is to establish the perpetration of a nuisance by Respondents in their operation of a motion picture theatre and bookstore wherein allegedly lewd and obscene motion pictures and printed publications are offered, by advertisement, to the general public or a portion thereof. The temporary relief sought is (1) the enjoining of Respondents from further maintenance of the said alleged nuisance, (2) The closing of the theatre and bookstore pendente lite, and (3) the enjoining of the removal from the said premises of any personal property therein, or the interference therewith.

The Court finds that, as alleged, there have been numerous and repeated past violations of the laws and statutes of the State of Alabama and the ordinances of the City of Birmingham, Alabama, which govern, control and/or apply to the operation of the said motion picture theatre and bookstore, all in a manner such as to constitute a nuisance.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

ONE: Respondents, their servants, agents or employees, are each hereby, separately and severally and conjointly temporarily enjoined from further maintaining such nuisance and any further maintenance thereof or any violation of this Order shall constitute an open contempt of this Court and its solemn Order.

TWO: Said Respondents are further enjoined from removing from the premises of the Pussycat Adult Theatre and Bookstore any and all personal property therein, or the interference therewith.

THREE: The foregoing restraining orders shall continue in effect to abide the further orders and decrees of this Court.

DONE and ORDERED this the 29th day of May, 1973.

Circuit Judge in Equity Sitting

cc: Hon. Herbert Jenkins
Hon. Ferris Ritchey

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
(SOUTHERN DIVISION)

MTM, INC., an Alabama Corporation

and

MOBILE BOOKMART, INC., an Alabama Corporation,
Plaintiffs,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama;

EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama;

and

HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Defendants.

Also serve, in his statutory capacity only, under 28 U.S.C. § 2284(2), and not as Defendant,
His Excellency, GEORGE C. WALLACE,
Governor of the State of Alabama.

CIVIL ACTION NO. CA 73-427

COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, DECLARATORY JUDGMENT AND CONVOCATION OF THREE-JUDGE COURT

TO THE HONORABLE JUDGES OF SAID COURT:

Plaintiffs, by and through their attorneys at law, FERRIS RITCHEY, Esquire, GILBERT H. DEITCH, Esquire and

ROBERT EUGENE SMITH, Esquire, complaining of Defendants herein, jointly and severally, respectfully allege as follows:

I.

JURISDICTION

1.

This is a civil action whereby Plaintiffs pray a preliminary and permanent injunction issue to restrain Defendants, and each of them, from acting under the law of Alabama to close Plaintiffs' places of business as a "nuisance," as that term is understood under Alabama Law, Chapter 31, Title 7, Code of Alabama, 1940. Plaintiffs pray, as well, a declaratory judgment to determine the constitutionality of the procedures to abate common or public nuisances under said law, as written and/or as applied, and as threatened to be applied herein. Plaintiffs pray for a three-judge court to make such determination.

2.

Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions herein presented by 28 U.S.C. § 1343(3) which provides, in pertinent part, that the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> "To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States . . ."

and the organic law which authorizes the institution of this suit founded on 42 U.S.C. § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Suit is further founded on 28 U.S.C. § 1343(4) "to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights . . .," as well as *Article III, Section 2 of the Constitution of the United States.*

Prayer for injunctive relief is founded on *Rule 65* of the *Federal Rules of Civil Procedure.*

Prayer for declaratory relief is founded on *Rule 57* of the *Federal Rules of Civil Procedure*, as well as *28 U.S.C. § 2201.*

Jurisdiction for convocation of a three-judge court is founded on *28 U.S.C. §§ 2281* and *2284:*

II.

PARTIES

3.

Plaintiff MTM, INC., an Alabama corporation with its principal place of business at 7610 First Avenue, North,

Birmingham, Alabama, is engaged, through its agents, servants and employees, in the dissemination of movies which are presumptively protected under the *First Amendment* to the *Constitution of the United States*

Plaintiff MTM, INC. is further engaged through its agents, servants and employees, in the sale and offering for sale of books, magazines, newspapers, movie films pictures and other materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States.*

Plaintiff MOBILE BOOKMART, INC., an Alabama corporation, is engaged, through its agents, servants and employees at 424 Nineteenth Street, North, Birmingham, Alabama in the sale and offering for sale of books, magazines, newspapers, movie films, pictures and other materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States.*

4.

The materials disseminated and/or offered for sale by Plaintiffs are comparable to those declared not to be obscene by the Supreme Court of the United States, and many other inferior federal courts, as well as state appellate courts and, hence, are protected expression under the *First Amendment* to the *United States Constitution.* No sales or offerings are made by Plaintiffs to persons under eighteen (18) years of age (minors) of any of the adult-type publications or materials distributed by Plaintiffs herein, nor are they "pandered" in the *Ginzburg* sense, nor are the materials sold in such a way that unwilling persons cannot avoid them.

5.

WILLIAM J. BAXLEY is named as a Defendant in his capacity as Attorney General for the State of Alabama and as the official authorized by Alabama Law to act on behalf of the State of Alabama to abate a nuisance.

6.

EARL C. MORGAN is named as a Defendant in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama and as the official authorized by Alabama Law to act on behalf of the State of Alabama to abate a nuisance.

HERBERT JENKINS, JR., is named as a Defendant in his capacity as Assistant City Attorney for the City of Birmingham, Alabama and as the official authorized by Alabama Law to act on behalf of the State of Alabama to abate a nuisance.

7.

The named Defendants, in their official capacities only as foresaid, are joined herein to make enforceable and binding upon them and/or their agents, servants, employees, attorneys and those under their control by law, any preliminary and/or permanent injunction, declaratory judgment and/or other order that may issue by this Court.

III.

FACTUAL ALLEGATIONS

8.

At all times relevant hereto, Defendants and/or their agents, servants or employees and others acting under their direction and control, and each of them, separately and in concert, under color and pretense of law, to-wit, under color of state statutes, custom and usage of the said statutes referred to hereinabove, have deprived, are continuing to deprive, and threaten further to deprive Plaintiffs, their agents, servants and employees of rights, privileges and immunities guaranteed to them by the *First, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States,* offered for sale or exhibition under nonobtrusive circumstances to interested adults only.

9.

On or about September 1, 1970, Plaintiff MTM, INC. opened its place of business at 7610 First Avenue, North, Birmingham, Alabama.

10.

Subsequent to the opening of MTM's business, THE PUSSYCAT ADULT THEATRE and BOOKSTORE, Chester McKinney and Thomas McGary were arrested and charged with knowingly displaying obscene material, which cases are presently pending, there having been no final judicial determination.

11.

On or about August 20, 1971, Plaintiff MOBILE BOOKMART, INC. opened its place of business at 424 Nineteenth Street, North, Birmingham Alabama.

12.

At the commencement of business, both Plaintiffs were issued appropriate business licenses to do business at the said locations.

13.

On or about March 2, 1973 ROGER A. BROWN, Deputy District Attorney, filed a Bill of Complaint in the Circuit Court for the Tenth Judicial Circuit of Alabama, In Equity, styled STATE OF ALABAMA, ex rel EARL C. MORGAN, District Attorney, Tenth Judicial Circuit, State of Alabama, vs. The Magazine "ACTION, Volume 1, No. 2," CHESTER McKINNEY, individually and d/b/a CLASSIC ADULT CENTER, Docket No. 177-120, to declare a magazine entitled "ACTION, Volume 1, No. 2" in violation of the Code of Alabama of 1940, Title 14 § 374(3) and to declare CLASSIC ADULT CENTER a public nuisance, and requested that "an Order issue restraining all respondents from preparing, selling, exhibiting or commercially distributing, or giving away, or offering to give away, or possessing with the intent to sell, any obscene, pornographic books, magazines, pamphlets, films, devices or articles and that an Order issue from this Honorable Court directing the Sheriff of Jefferson County to close and padlock the CLASSIC ADULT CENTER and remove the occupants therefrom". (A copy of said Bill of Complaint is attached hereto as Exhibit "A".)

14.

On or about March 7, 1973, HERBERT JENKINS, JR. filed a Bill of Complaint in the Circuit Court of the Tenth Judicial Circuit of Alabama – In Equity – styled STATE OF ALABAMA, on the relation of HERBERT JENKINS, JR., Assistant City Attorney of the City of Birmingham, Alabama vs. MTM, INC., CHESTER McKINNEY, THOMAS McGARY, RICHARD ROE and ABC CORP., Docket No. 177-199 to close Plaintiff's place of business as a public nuisance pursuant to Chapter 31, Title 7, Code of Alabama 1940.

15.

The Bill of Complaint alleged: "that under the provisions of Section 1107, Title 7, Code of Alabama, 1940 the exhibition of certain of said films has been established to be a nuisance as defined in that chapter of the Code which definition reads as follows:

> 'Sec. 1091. Definitions. For the purpose of this article, the terms place, person, nuisance are defined as follows: Place– shall include any building, erection or place or any separate part or portion thereof or the ground itself; Person – shall include any individual, corporation, association, partnership, trustee, leasee, agent or assignee; Nuisance – shall mean any place as above defined in or upon which lewdness, assignation or prostitution is conducted, permitted, continued or exist, and the personal property and contents used in conducting or maintaining any such place for any such purpose.'

"17. That each and all of the foregoing acts of the respondents in the use of said property for the use and purposes and in the manner aforesaid, interferes with the tranquility, peace and quiet generally, of petitioner and citizens of the City of Birmingham, Alabama and the nearby communities, and constitutes unlawful, unwarranted, and unreasonable use of respondent's property to the extreme annoyance, disturbance, discomfort and hurt of petitioner and is detrimental to the public good and the common welfare; such lewd action, conduct are offensive to public decency, morals, peace and health and constitute a public nuisance which is subject to abatement under Chapter 31, Title 7, Code of Alabama 1940 and should be forthwith abated and enjoined; and petitioner believes the respondents, by themselves and through their agents or representatives, will continue in the future to exhibit the motion picture films complained of and such similar films to those herein specifically mentioned and similar to those which are adjudged obscene in the prosecutions listed hereinabove at the Pussycat Adult Theatre." (Attached hereto as Exhibit "B".)

16.

Said nuisance actions are a calculated effort to impose a prior and indeed, permanent, restraint upon the distribution of materials presumptively protected by the *First Amendment* to the *Constitution of the United States* and are designed to have a "chilling effect" upon the exercise of said freedoms by Plaintiffs.

17.

The Defendants and/or their agents, servants and employees have established a pattern of conduct under color of enforcement of state law, customs and city ordinances within the City of Birmingham, Alabama of harassment and bad-faith prosecutions, under facially invalid statutes and ordinances, attempting the ultimate suppression of presumptively protected publications, motion pictures and materials without, to this date, ever having had any final judicial determination that any of said publications, motion pictures or materials are, in fact, obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees will continue to engage in the acts of utilizing nuisance laws, as well as other unconstitutional enactments and conduct that has had the effect of perpetuating a "chilling effect" upon the exercise of Plaintiffs' *First Amendment* rights, as well as the right of interested adult citizens of the City of Birmingham and the State of Alabama, and of the other forty-nine states who may visit Alabama and who wish to exercise their *First Amendment* right to buy, review and view non-obscene publications and films. The frantic efforts on the part of Defendants to close Plaintiffs' businesses and the threatened closure under the guise of the abatement of a nuisance constitute attempts at a constitutionally invalid "prior restraint" which is condemned by the *First, Fifth* and *Fourteenth Amendments* to the *Constitutional of the United States* and which might be apropos in a police state, but is anathema to a free society such as ours.

IV.

BASIS IN LAW FOR RELIEF

18.

The aforesaid conduct of Defendants, their agents, servants, employees and attorneys, and others acting under their direction and control, and each of them, in seeking to close Plaintiffs' businesses under the guise of abating a nuisance under the conditions here present is a "prior restraint," condemned by the *Constitution of the United States* and has a "chilling effect" on the exercise of Plaintiffs' constitutional rights, more particularly the *First* and *Fifth Amendments* thereof, as made obligatory on the states under the *Fourteenth Amendment*. The conduct of Defendants, their agents, servants and employees, in seeking to close Plaintiffs' businesses is deprivation of Plaintiffs' rights to Due Process under the *Fifth Amendment* to the *Constitution*, as well as an all-too-effective restraint on the exercise of Plaintiffs' rights to see, disseminate and distribute presumptively protected printed matter to the interested adult public.

19.

As a further result of the conduct of the Defendants, their agents, servants, employees and attorneys, the Plaintiffs have been intimidated in their trade and businesses, and if the businesses are closed, they will suffer complete loss of profits, as well as damages as a result of the substantial interference with their advantageous business relations.

20.

By reason of the conduct of the Defendants, their agents, servants, employees and attorneys as aforesaid, the civil rights of Plaintiffs under the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *United States Constitution* have been and will be violated to their irreparable harm. Unless enjoined. Defendants, their agents, servants, employees and attorneys will continue in the course of conduct to Plaintiffs' further imminent and irreparable harm, for which they have no plain adequate remedy at law, and the conduct of Defendants, their agents, servants, employees and attorneys, has had and threatens to have a continuing "chilling effect" on the Plaintiffs' exercise of their *First Amendment* freedoms. Immediate and irreparable injury, incalculable loss and damage will result to Plaintiffs if a preliminary injunction is not issued, forbidding Defendants, their agents, servants, employees and attorneys from continuing in their proposed wholly illegal conduct as aforesaid, under color of enforcing said state statutes, nuisance laws and city ordinances.

Said statutory provisions, ordinances and the law of nuisance are repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* for the following reasons:

(a) Said statutes, ordinances and law and their application to Plaintiffs constitute a classical "Prior restraint" on materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States*, which has been condemned by the Supreme Court of the United States in an unbroken string of cases beginning with

Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) and continuing through the 1970 term of that Court with its decisions in *New York Tims Company v. United States*, 403 U.S. 713 (1971) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 29 L.Ed. 2d 1 (1971);

(b) Said law of nuisance denies Due Process and Equal Protection of the Laws to Plaintiffs in that said law makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public or common nuisance; all of which is repugnant to the *First, Fifth* and *Fourteenth Amendments* to the *United States Constitution;*

(c) Said statutory provisions, ordinances and law of nuisances are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute, ordinances and law set forth standards at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in *First Amendment* matters;

(d) Said statutory provisions, ordinances and law of nuisances are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedom, because the said provisions are susceptible of sweeping and improper application by Defendants and have a "chilling and inhibiting effect" on the exercise of the federal and state constitutional rights of citizens of the State of Alabama and the United States, we well as those of Plaintiffs, to publish, disseminate, distribute, circulate, sell, receive, and/or purchase movies and printed publications;

(e) Said statutory provisions, ordinances and law of nuisances are repugnant to the substantive Due Process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* because they permit deprivation of liberty and/or property interests for the exercise of First Amendment rights by unreasonable, arbitrary, and capricious means by Defendants and/or their agents, servants, employees and attorneys without a showing of a real and substantial relationship to any state or city subordinating interest which is compelling to justify state or city action limiting the exercise by Plaintiffs of *First Amendment* freedoms;

(f) Moreover, the Alabama law of nuisance, by labelling a place of business a nuisance on the basis of isolated transactions creates an invalid presumption of the type condemned by the United States Supreme Court in *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed. 2d 56, in that it violates the *Fifth* and *Fourteenth Amendments* of the Constitution of the United States;

(g) Moreover, said presumption deprives Plaintiffs of their *Fifth* and *Fourteenth Amendment* rights under the *Constitution of the United States* to have every element making up a nuisance to be proven, by competent evidence, in a *First Amendment* context, beyond a reasonable doubt.

V.

RELIEF SOUGHT

21.

Plaintiffs are further entitled to and desire that this Court enter a declaratory judgmen· on final hearing under the provisions of *28 U.S.C. § 2201* and *Rule 57* of the *Federal Rules of* Civil Procedure, declaring the Alabama law of nuisance, Chapter 31, Title 7, Code of Alabama, 1940 as written and/or as applied, unconstitutional.

22.

Plaintiffs are entitled to and desire that a three-judge court be convened to determine the constitutionality of said statutes, ordinances and law, pursuant to *28 U.S.C. §§ 2281* and *2284*.

23.

Plaintiffs are entitled to and desire that this Court issue a preliminary injunction restraining and enjoining each of the Defendants, their agents, servants, employees and attorneys, and any and all other persons acting under their direction and control, and each of them, and persons in active concert with them from proceeding against Plaintiffs in the action referred to in Paragraphs 13 and 14 hereof.

WHEREFORE, Plaintiffs pray:

1. That a three-judge court be convened to hear and decide the issues raised herein.

2. That a preliminary injunction issue upon hearing, restraining Defendants, and/or their agents, servants, employees and attorneys, pending a hearing and determination of Plaintiffs' application for permanent injunction from continuing to proceed against Plaintiffs in the action referred to in Paragraphs 13 and 14 hereof.

3. That after final hearing, and injunctions be made permanent and said statutes, ordinances and law of nuisances referred to hereinbefore be declared unconstitutional as written and/or as applied to the controlled distribution and dissemination of adult-type publications, motion pictures and materials to persons eighteen (18) years of age or older in a non-obtrusive manner, absent *Ginzburg*-type pandering, by Plaintiffs herein.

4. That a permanent injunction issue restraining Defendants, their agents, servants, employees and attorneys and any and all other persons acting under their direction and control from (a) enforcing or acting under said statutes, ordinances and law referred to above in an unconstitutional manner, or to apply them in a manner to obtain unconstitutional results with respect to Plaintiffs, their agents, servants, and employees, and (b) otherwise harassing Plaintiffs in the conduct of their lawful businesses without first securing and providing for, after due notice to Plaintiffs, a judicially superintended prior adversary hearing on the issue of obscenity, in the constitutional sense.

5. That the Governor and the Attorney General of the State of Alabama be given notice by registered mail of the pendency of Plaintiffs' application for preliminary injunction as required by *28 U.S.C. § 2284(2)*.

6. That Plaintiffs have such other and further relief as may be appropriate under the circumstances in this case, together with costs.

Respectfully submitted,

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APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION**

MTM, INC., AN ALABAMA CORPORATION:
AND MOBILE BOOK MART, INC., AN
ALABAMA CORPORATION,
Plaintiffs,

v.

WILLIAM J. BAXLEY,
Et Al,
Defendants.

CIVIL ACTION
No. 73-427-S

GENERAL CORPORATION,
Et Al,
Plaintiffs,

v.

EUGENE SWEETON,
Et Al,
Defendants.

CIVIL ACTION
No. 73-194-NE

Birmingham Alabama,
October 4, 1973.

(T. 1)

BEFORE:

THE HONORABLE RICHARD T. RIVES, CIRCUIT JUDGE.

THE HONORABLE FRANK H. McFADDEN, DISTRICT JUDGE.

THE HONORABLE SAME C. POINTER, JR., DISTRICT JUDGE.

APPEARANCES:

MR. FERRIS S. RITCHEY, JR., Shell-Al Building, (T. 2) Birmingham, Alabama, and MR. ROBERT EUGENE SMITH, 100 Colony Square, Atlanta, Georgia, for the plaintiffs MTM, Inc. and Mobile Book Mart, Inc.

MR. HERBERT JENKINS, JR., Assistant City Attorney, City of Birmingham, Alabama, for the defendants.

MR. FRIERSON M. GRAVES, JR., of the firm of Heiskell, Donelson, Adams, Williams and Wall, First National Bank Building, Memphis, Tennessee, for General Corporation.

MR. GLENN F. MANNING, Terry Hutchens Building, Huntsville, Alabama, and A. S. JOHNSTON, III, Schwan Building, Biloxi, Mississippi, for the defendants.

MR. JAMES S. GARRETT, Deputy District Attorney, Tenth Judicial Circuit, Birmingham, Alabama for the Defendant Earl C. Morgan.

(T. 3)

PROCEEDINGS

(Judge Rives): Call the consolidated cases of MTM, Inc. and others against Baxley and others and General Corporation and others against Eugene Sweeton and others.

Are the appellants ready – no, pardon me, are the plaintiffs ready in the MTM case?

(Mr. Smith): Yes, sir.

(Judge Rives): May I ask the plaintiffs in the MTM case, that case is not quite at issue on the merits, is it? No answer been filed on motions?

(Mr. Smith): That is correct.

(Judge Rives): Are you gentlemen willing for the merits to be expedited and submit the case on the merits?

(Mr. Smith): Yes, sir.

(Judge Rives): Or can it be stipulated that the case will be submitted on the merits as well?

(Mr. Jenkins): 'Yes, sir, except we have a partial transcript of the testimony in the State Court proceedings on the issue of preliminary injunction which I believe they would not have any objection to admitting and we would submit it on that basis.

(T. 4) Of course, we don't waive our argument.

(Judge Rives): The defendants in the MTM case, are they willing to stipulate the case may be submitted on the merits?

(Mr. Smith): We are the plaintiffs.

(Mr. Jenkins): Well, I was speaking maybe in advance.

(Judge Rives): But you are speaking for the defendants?

(Mr. Jenkins): Yes, sir.

(Mr. Smith): We don't think the transcript has any relevancy. We don't question the authenticity.

(Judge Rives): There is no objection to it being offered?

(Mr. Smith): No objection to it being offered.

(Judge Rives): So it may be stipulated that the MTM case is that it should?

(Mr. Smith): Yes, sir.

(Judge Rives): And may be decided upon the merits?

(Mr. Smith): Yes, sir, this would be a hearing on the permanent injunction?

(T. 5) (Judge Rives): Yes.

(Mr. Jenkins): Your Honor, would it be in order to offer the transcript in the State Court testimony?

(Judge Rives): I was going to ask if either one of you have any witnesses?

(Mr. Smith): No, sir.

(Mr. Jenkins): No, sir.

(Judge Rives): And is that the only evidence either side has?

(Mr. Jenkins): Yes, sir.

(Judge Rives): I think we will wait to see whether the other case is ready for hearing and get both of them.

General Corporation against Sweeton and others. That is at issue on the merits and there has been an answer filed and ready for submission?

(Mr. Graves): Yes, sir, for the permanent – preliminary and permanent injunction.

(Judge Rives): Are the plaintiffs ready in that case?

(Mr. Graves): Yes, sir, Your Honor, the only thing we want to submit which I talked to Mr. (T. 6) Younger is several other pleadings in the State Court which were filed after our complaint was filed such as there was an amendment to the final decree, a petition to rehear and an order denying the rehearing and we can submit those copies and with that we have no witnesses and no evidence and we are ready for it to be decided on the merits as a matter of law.

(Mr. Manning): The defendants are ready.

(Judge Rives): There will be no objection to the additional pleadings?

(Mr. Manning): No, sir.

(Judge Pointer): Will there be evidence on behalf of the defendant via witnesses?

(Mr. Manning): Not via witnesses, no, sir.

(Judge Rives): Any documentary evidence?

(Mr. Manning): Yes, sir, there will be documentary evidence.

(Judge Rives): No witnesses to be called on either side so it seems to me we are ready for you gentlemen to proceed with the introduction of evidence.

(Mr. Graves): Your Honor, on behalf of the General Corporation and others in that case, what we would like to introduce is the amendment to the decree (T. 7) in each of the three cases which were entered in the State Court on March 23rd, 1973 and the application for rehearing in the General Corporation case which was filed on March 26, 1973 and I don't have a copy of that and I asked Mr. Younger for the order denying rehearing but we will submit that to the court. Mr. Younger said he agrees and would stipulate an order was entered denying the petition for rehearing. With that those are the only documents that we would introduce on behalf of the General Corporation and others in that case.

(Judge Rives): If there is no objection they may be received and marked.

(Plaintiff's Exhibit 1 and 2 marked for identification.)

(Judge Rives): Any evidence on behalf of the defendants?

(Mr. Johnston): Your Honor, we have brought from the record in the State case all of the photographic evidence which gave the State Court the basis for finding the films obscene as a matter of law and we have those here and they are in folders and they can be offered as one exhibit actually.

(T. 8) (Judge Rives): No objection?

(Mr. Graves): No, I do want to voice an objection that I think this court is deciding, as a matter of law, whether the statute would be applicable and for that reason that whether or not one particular motion picture or two or three might have been determined by the State Judge to be obscene, would have no bearing on the future showing of any motion pictures since each motion picture must be judged on its own merits.

I would just state that objection to the court.

(Judge Rives): Might not be relevant on some issues but might be relevant on others?

(Mr. Graves): Yes, Sir.

(Judge Rives): The objection will be over-ruled.

(Mr. Graves): All right.

(Judge Rives): I presume that was an announcement in the General Corporation case?

(Mr. Graves): That would be for all three plaintiffs that we would raise the same objection because the exhibit goes to each of the separate (T. 9) plaintiffs.

(Judge Pointer): But it relates to each of the three plaintiffs in what I would call the Huntsville case?

(Mr. Graves): Yes, sir.

(Judge Rives): All right, in the MTM case –

(Mr. Smith): May it please the Court, my name is R. E. Smith, attorney for MTM together with Mr. Ritchey and we have several exhibits which we would formally offer at this time in evidence. They were attached – the first several were attached to our original complaint and I understand Mr. Jenkins makes no question regarding authenticity and Mr. Jenkins is the attorney and is a defendant himself in this matter and we presume that the State Attorney's Office and Mr. Morgan's office has no objection to authenticity.

First to be offered on behalf of MTM would be the bill of complaint in the Circuit Court for the Tenth Judicial Circuit of Alabama in Equity and that is styled State of Alabama ex rel Morgan versus the Magazine Action, Volume 1, Number 2, Chester McKinney individually and doing business as Classic Adult Center.

(T. 10) We would offer that if the Court please.

(Plaintiff's Exhibit 3 marked for identification.)

(Mr. Graves): And second would be the complaint and application for temporary and permanent injunction to abate a nuisance in the State of Alabama Jefferson County Court of the Tenth Judicial Circuit, Number 177-199 but such as it is counsel for the defendant would agree that need not be further authenticated.

(Plaintiff's Exhibit 4 marked for identification.)

(Mr. Graves): The next item, Your Honor, an order in the nature to show cause filed in that same case just made reference and this was dated I think the 7th day of March, 1973 and appears to be executed by Judge Barber and counsel for the defendants would agree that that is Judge Barber's signature and photocopy and we are therefore filing this is lieu of the original, is that correct?

(Mr. Jenkins): Yes, sir.

(Plaintiff's Exhibit 5 marked for identification.)

(Mr. Graves): That also, Your Honor, was (T. 11) part of the complaint filed in this case.

And the last which is not part of the complaint filed in this case is the order upon prayer for temporary injunction in Case No. 177-199 entered by Judge Barber and also appears to carry his signature dated May 29, 1973 and counsel I think would agree this is a photocopy of Judge Barber's signature and need not be further authenticated.

(Plaintiff's Exhibit 6 marked for identification.)

(Mr. Smith): As a word of explanation, there has been no final order in the State Court proceedings brought by Mr. Earl Morgan's office which was the first item I offered I think.

Thank you.

(Judge Rives): Since this order of Judge Barber on temporary injunction there has been no further order?

(Mr. Smith): There were several items – different items involved in each complaint and one was a complaint brought by the City and Mr. Jenkins and that is the case that Judge Barber had assigned to him and there was another case brought by Mr. Morgan's (T. 12) office which was not assigned to Judge Barber and there was no order issued and that relates to a different establishment, not the theatre.

(Judge Rives): Have appeals been prosecuted from the order?

(Mr. Smith): No, sir, there was a temporary restraining order and it was not a preliminary injunction and it was my understanding, relying upon Mr. Ritchie who is my expert on Alabama law and procedure, one does not file an appeal from a temporary restraining order.

(Judge Rives): At any rate no appeal has been filed?

(Mr. Smith): That's right.

(Mr. Jenkins): I would like to clarify that, Judge, there was a temporary injunction, I filed for a temporary injunction and the court issued the temporary injunction and there is appealable and it was not appealed. They did file a demurrer which was not ruled on, which under the new rules is

considered a motion to dismiss and it is ready for final submission but we put it off pending this hearing.

(Judge Rives): And the General Corporation (T. 13) case which is to be decided on the merits, I notice an appeal apparently filed on the very last day.

(Mr. Graves): Your Honor, I don't know whether it was the last day or not but there was an amendment to the final decree and a petition for a rehearing and the denial of it that went on up into May.

(Judge Rives): At any rate there is an appeal filed in that case?

(Mr. Graves): Yes, sir.

(Judge Rives): Any question about the timliness of the appeal?

(Mr. Graves) No, sir.

(Mr. Manning): I think no question about the timliness.

(Mr. Johnston): In the other two cases I might add, Your Honor, along with General which as Judge Pointer said was the Huntsville case, nothing has been filed by way of appeal.

(Judge Rives): Is there any further evidence in either case to be introduced?

(Mr. Jenkins): Yes, sir, at this time in the MTM case I offer the parts of the testimony given at (T. 14) the

preliminary injunction hearing in the State Court before Judge Barber on behalf of the City.

(Defendant's Exhibit 2 marked for identification.)

(Mr. Jenkins): I might mention to the Court that Mr. Jim Garrett of the District Attorney's Office represented the District Attorney's Office in the other case, the Mobile Book Mart and I don't know the posture of the case but it was mentioned but I don't represent them as such. I represent the City in the MTM case only.

(Mr. Manning): On behalf of the defendants in the Huntsville cases I would like to ask counsel for the plaintiffs to stipulate as to the truth of Paragraph 34 attached to the proceedings in these cases.

(Mr. Johnston): May it please the court, while counsel are conferring might I point out that these exhibits which we have offered, the photographs are all of what we call the time and motion studies of the films that were shown in the three theatres. They are not all of the photographs because there were some pictures taken just of the theatres, the (T. 15) fronts and these photographs or the exhibits in the State cases may be needed in the appeal. We just got them released for presentation here and if it is necessary they will have to be shipped back and forth or we will have to make arrangements for them to be copies or something of that sort.

(Judge Rives): They are borrowed from the State Court?

(Mr. Johnston): Yes, sir, and we have copies in reduced size but for you to get the full impact of them in this present size and you can look at them and then we have copies of the reduced size and we can submit those and substitute them.

(Judge Rives): There is an objection as I understand it in the Birmingham case to the transcript of the State Court proceedings, is there not?

(Mr. Jenkins): No, sir.

(Mr. Smith): There is an objection, Your Honor, to the receipt of the transcript because the Court reconvened the hearing and counsel for the respondant wasn't present so they had a whole new hearing. Is this the transcript in the second hearing or the first hearing?

(T. 16) (Mr. Jenkins): I said it was a partial transcript of the testimony given on the issue in the temporary injunction. There were two hearings and this is the first part and then it was continued after it was remanded.

(Mr. Smith): May I have counsel to respond to that?

(Mr. Jenkins): He wasn't there by choice. He left of his own violition.

(Mr. Ritchey): I left with the permission of Judge Barber and in my absence testimony was taken and an order was issued by this court transferring that from the State Court to this court. Later there was, on a motion to remand, it was granted and the matter was given back to Judge Barber and

started all over again and took the same testimony over again. Now, if it is the second testimony that is offered we would have no objection but I think the first testimony was never considered. We started all over again and took the same testimony from the same witnesses.

(Mr. Smith): I have no objection to stipulating –

(T. 17) (Mr. Jenkins): We agreed to resubmit the first testimony and then you continued with cross examination on recalling some witnesses that were interrogated. All we are offering this for is to show the facts we have in the complaint that he offers as an exhibit. And it isn't – that is the only reason it is being offered. There is no dispute it is testimony that was given in that hearing.

(Mr. Ritchey): But it is not all of the testimony. That is the point I am trying to make. I don't mind stipulating the effect of the testimony if you want to agree to that but I would think that partial testimony without the cross examination and everything would't be proper. If we could stipulate the effect – what he testified to in substance –

(Judge Rives): Gentlemen, we will receive the testimony subject to objection and you may enter such stipulation or introduce anything you please.

(Mr. Manning): Your Honor, in the Huntsville case the parties would stipulate that Paragraph 34 of defendant's answers are correct and they are true with exception of the allogation that the suit was filed on the relation of Defendant Eugene Sweeton as a (T. 18) private citizen of the State and not an individual in the capacity as Chief of Police of the City of Huntsville.

I believe that is correct?

(Mr. Smith): Yes, sir.

(Mr. Manning): : And we will also stipulate that the exhibits that are attached to the various pleadings in this case both for the plaintiff and the defendant are authentic.

We would I think – probably this is already before the Court but we would also want to be sure that the complete record of the proceedings up until the time of the application for the restraining order with reference to proceedings in the State Court and they were certified by the Registrar of that court prior to the entrance of the restraining order, that those are authentic and we are offering those into evidence at this time.

(Mr. Graves): Yes, sir.

(Mr. Manning): The complete record of the proceedings up to that point. I believe they have been in the custody of the court ever since we offered them. We offered them at the time of the hearing before (T. 19) Judge Pointer.

(Judge Pointer): I believe we have that as an exhibit in the file of the Huntsville case.

(Judge Rives): Any further evidence in either case to be introduced?

(Mr. Jenkins): Mr. Garrett wants to know did you introduce a copy of the complaint in the case of Earl Morgan against the Book Store?

(Mr. Smith): Yes, sir.

(Judge Rives): Then I suppose we comd down to the argument. You gentlemen want to introduce anything before the argument?

(Mr. Johnston): Well, we would like to ask this question. We were never furnished with a copy of any order ruling on this question of whether the Three Judge Court was proper or even assigning the Three Judge Court and we were only furnished with a copy of the order consolidating the cases. And if there is such an order maybe we should have it for our complete record and file. That order would be in response to the request for briefs as to whether a Three Judge Court, which was originally submitted to a different panel and maybe Judge Pointer can (T. 20) fill us in on that.

(Judge Pointer): In each of the two cases, and that order appears or should appear in the official record and file. I should say that the standard form order makes no reference to any legal conclusions or the like and merely notes those matters remained open for the court to decide.

(Judge Rives): Been no decision by this court whether it is a proper case for a Three Judge Court but there has been a designation of a Three Judge Court in both cases.

(Mr. Johnston): That answers the question.

(Judge Rives): The form specifically said this designation and composition of the Three Judge Court is not a prejudgment, expressed or implied, as to whether this is

properly a case for a Three Judge rather than a One Judge Court. Which is in turn left to the panel.

(Mr. Johnston): Thank you.

(Judge Rives): I haven't seen any briefs addressed to that question.

(Mr. Manning): There were briefs filed earlier, Your Honor.

(T. 21) I think perhaps this might be the time, Your Honor, to renew the Defendant's Motion in the General Corporation case, the motion to dismiss filed earlier in this proceedings. We would like to renew the motion.

(Judge Rives): We understand the case is being submitted on all the motions that have been filed.

(Mr. Manning): Yes, sir.

(Judge Rives): And on the –

(Mr. Manning): And on the merits.

(Judge Rives): And on the merits – on the answer, rather. I don[t know how far we reached the merits or how far we reach the question wither the cases go back to the State Court. That is one of the pivotal questions we would like for you gentlemen to get settled in our minds early. I don't understand that you have to reintroduce all of your motions. There are some motions to dismiss parties and

motions to dismiss the entire actions, the case and the notice of hearing was simply a notice of the hearing without saying what the hearing was about. My understanding was it was submitted on everything that is at issue.

(T. 22) (Mr. Manning): Yes, sir.

(Judge Pointer): I think it might stand clarification now that in the Huntsville cases I did overrule the motion to dismiss and I believe I indicated to counsel at the time that I was doing so primarily in order to get the answer filed and the motion to dismiss was in effect still before the court on a renewed basis at that time.

(Mr. Manning): Yes, sir, as a matter of fact, Judge, as I recall it you suggested to us that we might want to renew the motion before the Three Judge Panel. That is the reason I did it.

(Judge Rives): That may be appropriate to do that.

(Judge Pointer): I think that has just been done.

(Judge Rives) In the MTM case, how many attorneys do we have who want to argue for the plaintiff.

(Mr. Smith): Just one, Your Honor.

(Judge Rives): How many for the defendant.

(Mr. Jenkins): I am the only defendant in this case, Your Honor, and I will argue that.

(T. 23) (Judge Rives): One attorney on each side and then the General Corporation case, how many attorneys for the plaintiff?

(Mr. Graves) Just one.

(Mr. Jenkins): Excuse me, Mr. Garrett is here representing Earl Morgan and there are two cases and I overlooked that. They are consolidated, his case and my case. So he will be arguing for the District Attorney Earl Morgan.

(Judge Rives): That is in the MTM case.

(Mr. Jenkins): Yes, sir.

(Mr. Garrett): May it please the Court, I was brought into this case recently and my argument will be abbreviated at best. I will argue strictly on the motions that I have previously been filed by our office.

(Judge Rives): How much time would you gentlemen desire to argue for the plaintiffs?

(Mr. Smith): May I have a moment, Your Honor?

I would propose, Your Honor, in the MTM and Mobile Book Mart case, fifteen or twenty minutes for our presentation and rebuttal.

(T. 24) (Mr. Jenkins): That is satisfactory with us for our rebuttal.

(Judge Rives): Twenty minutes?

(Mr. Smith): Yes, sir.

(Mr. Graves): I would say the General Corporation case about the same and might be less if Mr. Smith covers most of the legal points because I would just want to touch on my facts as well as maybe a little more law.

(Judge Rives): And on the defendants?

(Mr. Manning): I think we could do it very well, Judge, at least in thirty minutes because we would like to split our argument between myself and Mr. Johnston.

(The Court): You and Mr. Johnston both thirty minutes?

(Mr. Manning): Yes, sir.

(Judge Rives): All right, Mr. Jenkins, how much time would you want?

(Mr. Jenkins): Judge, we won't need over ten or fifteen minutes.

(Judge Rives): Apiece?

(Mr. Jenkins): For myself and Mr. Garrett. (T. 25) I don't know what he has got in mind.

(Mr. Garrett): May it please the Court, my argument will be much briefer than that. I will just argue my motions.

(Judge Rives): Twenty minutes to cover both of them.

(Mr. Jenkins): Yes, sir, we will divide it up.

(Judge Rives): The Court thinks probably since the cases are consolidated and it would probably add to clarity of it if the plaintiffs in both cases would argue first and then the defendants in both cases argue at that time.

Any objection to that procedure?

(Mr. Jenkins): No. sir.

(Judge Rives): We will hear all the plaintiffs' attorneys arguments first and then all of the defendants' attorneys argument.

(Mr. Smith): Your Honor, if the Court has no objection we thought because of the way the cases are styled on the pre-hearing order that General would go first and so that would be Mr. Frierson Graves.

(Judge Rives): All right, you may proceed with your argument.

(Mr. Graves): May it please the Court, my name is Frierson Graves and I am from Memphis, Tennessee. Associated with me in this case and I think he appeared prior before Judge Pointer last March was Mr. Michael Pleasant from Memphis in our office. Little did I know that Judge Pointer would get involved in a two and a half month anti-trust case and so that this matter would now come on in October for a hearing before this court.

This matter started out in the General Corporation – and I will refer to them merely as the Huntsville Theatres or just as the theatres because I consider them different from the

Birmingham Book Store. The theatres were faced with almost identical types of petitions in Huntsville that enjoined them as a nuisance. I think the parties tried to narrow the issues in the State Court because there was a pre-trial order entered by the court there in the Huntsville State Court in which I thought some very pertinent matters were brought up and issues resolved. And one of the issues that was resolved or stated (T. 27) in that original pre-trial order was that the motion pictures were not obscene or lewd as the words the Nuisance Statute used and that the statute itself did not apply and could not be applied to a motion picture theatre. The statute, I think the words of the statute are very important to be considered because it says "Nuisance shall mean any place as above defined," and that would mean building, "in which lewdness, assignation or prostitution is conducted." Now, I get the word – when you talk about this or similar type places you are considering that this word lewdness has to do with the same thing as prostitution or assignation or the similar type of conduct and you are talking about people doing that activity in that building whether they had – it might well have been supposed that they hird a hall and said we are going to have a giant, live, community sex show. Now just take a nudist camp but everybody come down and this is what we are going to do in this building. So you say O.K., you have lewdness, assignation or prostitution. But if they say we are going to show a motion picture which involves prostitution then you don't have a place in which lewdness, assignation or prosti-(T. 28) tution is committed.

Now, I have a case that I was employed to represent the people in Arkansas. In fact I cited in my brief three cases by the Arkansas Supreme Court, two involving the Southland Theatres and one involving Mini-Art Theatres in which the

Arkansas Statute which I admit is not in the exact words but is in this general nuisance theory was found not to apply to a motion picture theatre and I think that the Arkansas Supreme Court made a very pertinent statement when they said that the showing of a film under a statute involving nudism does not constitute the advocacy of nudism and is no more logical than saying that a film shown in an Arkansas theatre which depicts one person striking another constitutes assault in this state. The statute, is prohibiting nudism prohibits people from appearing nude and conducting a nudist camp, not films of people appearing nude at a nudist camp. While from a moral standpoint, one may be considered as odious and approbrious as the other, there is a definite legal distinction.

I think that that is what happened when you are considering the use of a nuisance statute (T. 29) against somebody putting up a picture of lewdness because you can go just as well and say that we are now going to have an exhibit of errotic art that may or may not be obscene under the definition of that term but it is still an expression under the first amendment and is different from saying we are going to now have a live person –

(Judge Rives): That is a question of construction of the State Statute as I understand now.

(Mr. Graves): Well, Your Honor, it involves first amendment rights.

(Judge Rives): And this statute, you don't have any legislative history except this passed in 1919.

(Mr. Graves): That's right. Now, we do have it being applied to liquor or something like that.

(Judge Rives): And the State Court has ruled against you on that:

(Mr. Graves): That's right.

(Judge Rives): Of course that involves both construction and application.

(Mr. Graves): That's right. But it was (T. 30) applied against this motion picture theatre and I admit I am not an Alabama lawyer but a Tennessee lawyer but to me it appeared under the statute and as I could see from what research I could do that there is absolutely no way that you could get a supercedus to continue the theatre open while you were under any appeal. That is the only way you could get the theatre open was for the person to secure a bond releasing the property in which they said therefore the property cannot be used for the nuisance, that is, showing of allegedly obscene motion pictures and, therefore, you risk the idea of contempt if you went back in and showed any motion picture in that theatre that the – Mr. Sweeton as Chief of Police might object to and then we could be faced with a contempt action and not for the summary type of contempt as poosed to what you could consider under a censorship ordinance if they had such thing and then the censorship cases they all say you have got to judge one film, give them a license to go to court and have a prompt hearing, etc.

(Judge Rives): And I suppose you will get down to the question of why the Federal Court should take jurisdiction of this question in preference to the State Court?

(Mr. Graves): Yes, sir, I will and I think Mr. Smith will talk about that because I think –

(Judge Rives): Do I understand that the Supreme Court in the Pursue case, that wuestion was not such a barrier becasue the parties – the plaintiff was not a party to the State Court proceedings: I notice Judge Calebrezze didn[t discuss it in his opinion.

(Mr. Graves): No, sir, he did not. In fact what we had was a final decree or at least a temporary injunction in the State Court in which there was a temporary restraining order and then the State proceeded to have a final injunction and then it went back to the Three Judge Court who overruled and held unconstitutional the final order in the Pursue case.

(Judge Rives): But at the instance of the parties who owned the premises who had not been on a lease hold but who had not been a party to the State Court proceedings.

(Mr. Graves): Well, as I understand it was (T. 32) really one person bought out another. Whether or not they had some connection or not, at least the question wasn't raised because, one, the court does make the statement that he does have standing because he is substituted for the other and I feel like it is the same thing as if the original lessee had brought it as opposed to the original lessee selling to another.

(Judge Rives): There is something I believe in the footnote that indicates it was bought.

(Mr. Rives): Yes, sir.

Your Honor, I would like to mention a little bit more about the facts because I did in my stipulation about the answer where it talks about 24, I wouldn't stipulate that Mr. Sweeton brought this in his capacity as a private citizen because it is very clear that not only were police officers, on the application for rehearing, not only were police officers – they were seeking pay for police officers, but they were seeking money for the City of Huntsville that had paid some material and also had owed the Citizens For Decent Literature something like $3,000 and they asked him for attorney's fees for private counsel and the City Attorney and maybe just for the City Attorney,(T. 33) Mr. Younger, and Mr. Johnston with the C. D. L., they were asking all of those, fees for them and certainly this was an action under the color of State Law where the Chief of Police was going in and they were not using what was really – about a little over a year ago suit was brought and that is where they began, the District Attorney over there had severed prior notices and that was the case in which General Corporation sued the District Attorney, not the City Attorney and it was eventually settled and all matters were dropped.

But that gets me down to where I think the Federal Court comes in in there being irreparable harm and injury and no adequate remedy at law. In the first place, Your Honor, when you come to the Fifth Circuit, and speaking in terms of Hunt versus Rodriquez, they are saying oh, no, you can't have a Three Judge Court, that the Fifth Circuit is different from the First Circuit and the Second Circuit, they have recently made some determinations that a single judge can't make that determination and in Hunt versus Rodriquez there was a book store case in which they went and seized all the books and then – but when (T. 34) they came on for hearing in the Federal Court the judge says well, you have already opened

one of the book stores back and you are going to open the other. Now, right here we have I think irreparable harm and injury without any adequate remedy at law because we have an order that states that the theatre is closed for all purposes within one year. True it says you can have a bond to open it up providing you don't show what may be under contempt, anything that might be considered a nuisance.

The second thing you have is that the personal property was ordered to be sold. Now, when the parties appeared before Judge Pointer it was agreed nothing would be done on selling any personal property until this matter had come on for hearing and had a decision.

(Judge Rives): And the theatres were actually closed?

(Mr. Graves): Yes, sir, they have been closed since February and still closed for the period – they are closed – they are permanently enjoined from showing any obscene motion picture and they are closed for a period – the real estate for a period (T. 35) of one year and you've got – how can you convert a theatre building into some other type of building without tremendous expense?

Likewise we believe that you have irreparable harm and injury because this is worse than a censorship ordinance. It is classic prior restraint for closing of a theatre that cannot show any motion pictures in the future which they might desire to show and have it be fuled on each film independant of each other.

In Tennessee, and Mr. Smith cites the case, one of the first decisions we had under our new obscenity statute which

was passed to comply with the Roth and Memoirs Test which now seems to have gone by the boards, was new Riviera Arts Theatre in Chattanooga and in that case the court not only issued an injunction but enjoined them from – in the future from showing any obscene film and the Tennessee Supreme Court said this is Classic first– prior restraint because even under a censorship statute that the Supreme Court set the guidelines in Freeman versus Maryland and various others, that each motion picture is presented for a license, and there must (T. 36) be a quick denial or granting of the license and if you don't do it you go to court. Now, here we don't even have that. We can't present any motion picture. The statute doesn't say anything about that, no censorship law, but Alabama had a very unique type obscenity statute because it said that if General Corporation was showing a motion picture which the District Attorney believed to be obscene, that this District Attorney served him a notice and that then if you disagree with that notice you could demand a hearing but he couldn't prosecute you until after he had served you with that notice that the film had been obscene. Now, we don't have that. What we have with no possible supercedious bond or remedy at all is the closing of the theatre for any particular showing.

Now, Your Honor, I believe that in the concurring opinion in the Mitchum case cited the fact that the Supreme Court said we really hadn't ruled on how you apply the Civil Actions, what you do in regard to a Younger case with criminal prosecution.

Now, I had a case in which I lost it in (T. 37) the Fifth Circuit of Palaio versus McAuliffe. Now, in that case it was determined and I raised this about this nuisance statute – I mean this petition to stop the showing of a movie, just enjoin

the showing of one named movie was a Civil procedure. But by the time we were in Federal Court a complaint had been filed in the State Misdemeanor Court and so Judge Thornberry said this is really part of the criminal law and the way that Georgia wants to do it and, therefore, we look at the nature of the proceedings and not the name that you give them and we find this injunction against a motion picture in the enforcement of the criminal law therefore Younger applied.

Now, I might pass on to the Court that that Palaio case is the same type of procedure that was Paris Art Theatre versus Slayton which was Mr. Smith's case in the Supreme Court. Now, in that case they had not indicted the man because the lower Judge had found the film not obscene and had not granted the injunction so the court said we approve this as a Civil procedure by case law which Georgia can do.

(T. 38) Now, we are sort of in a quandry in here but in any event the nuisance statute clearly provides in my mind that this is a civil remedy and you don't have quite the harshness that you would do in a Younger criminal proceeding where you are saying bad faith and harrassment and irreparable harm and injury.

(Judge Rives): That has been referred to by the Alabama Supreme Court as quasi-criminal.

(Mr. Graves): Yes, sir, and it has because you will note the statute provides, Your Honor, that there has been a criminal decision and then after that criminal decision it can be referred back and then go into the Equity Court to ask for an injunction that is in 1106 or 7 so I think that might be a consideration of quasi.

(Judge Rives): As you stand today as far as irreparable injuries are concerned, what relief can the Federal Court grant to you that the State Supreme Court cannot grant? As I understand by appealing you transferred the jurisdiction.

(Mr. Graves): Yes, sir.

(Judge Rives): From the trial court on to the State Supreme Court.

(Mr. Graves): Your Honor, I would think I must preface the remark by saying that the Federal Court and the State Court have a concurrent right in First Amendment rights or in Federal rights under the U.S. Constitution just as in the Fifth Circuit case where they talk about public and private rights, that the Federal Court is not the same as the Appellate Court but there is concurrent jurisdiction in enforcing those rights.

I agree that the Alabama Supreme Court could reverse the holding on the basis of their applying Federal law as well as this court can apply Federal law under the United States Constitution. However, we are still faced with what I say from the beginning when we – I believe we were in the same nature of the Pursue case and that I would have strongly wished that that case had been decided so that we could present it to Judge Pointer and say look, here is a reason for a temporary restraining order because we can't get any type of State Court relief at the present time and, therefore, we need this interpretation (T. 40) of the statute that are – should be successful on the merits and shouldn't apply and therefore we don't have to put up a supersedeas bond.

(Judge Rives): Of course, the Federal Courts cannot authoritatitvely construe the State Statute. To that extent the Alabama Supreme Court is in better position to decide this case than the Federal Courts are because if it construed this was purely a red light statute, I mean bawdy houses and cases of prostitution and not the statute aimed at lewdness in the sense of a censor, constitutional questions would go out the window.

(Mr. Graves): Yes, sir, and –

(Judge Rives): I don't understand that we can construe it with any authority because the Alabama Court can come right along and disagree with us.

I wonder though – you say that we have concurrent jurisdiction.

(Mr. Graves): Yes, sir.

(Judge Rives): Can we proceed upon that basis in the light of the Younger case? Suppose this court on the request for injunction takes one view of the law and the Alabama Supreme Court then takes a very (T. 41) different view, aren't we headed on a collision course between the two courts?

(Mr. Graves): Your Honor, I feel that this court can certainly construe and enjoin the enforcement of that State Court decree at this present time regardless of their any further carrying out of that appeal. Your Honor, you are sort of darned if you do and darned if you don't. Now, if you have the threat of a possible action for a nuisance and you come to Federal Court then the Federal Court says you have got no pending State Court action so there is absolutely no

threat for us to come in and have the friction of Federal and State Court relation. Then if you turn around and there is a pending suit then they say well, you've got State Court rights over there and you can raise your Federal questions there and which way do you go? You go on the fact that there having been irreparable harm and injury, and there having been a violation of the Federal rights under the First Amendment which take a little more care than some other rights, that the Federal Court ought to act and ought to step in and say having shown that all you've got is an appeal without a way to reopen the theatre (T. 42) and seeing that the statute is being applied properly in violation of First Amendment rights. You are not construing the statute from the standpoint of saying we construe the statute to mean it doesn't apply to bawdy houses. You are saying that this statute is a prior restraint on First Amendment rights and, therefore, should not be enforced against a motion picture theatre.

(Judge Rives): Actually, Mr. Graves, your time is slipping by.

(Mr. Graves): Yes, sir, I am sorry.

(Judge Rives): You have taken about twenty-five minutes.

(Mr. Graves): Well, Your Honor has asked some very interesting questions.

(Judge Rives): We don't want to limit you unduly but I would say you ought not take –

(Mr. Graves): I think that Mr. Smith will have adequate answer to that and I would like to have a couple of minutes in rebuttal if I could.

(Judge Rives): All right, you may have that.

(Mr. Smith): If it please Your Honor, we have set forth in our complaint filed in this case (T. 43) a summary of the facts. The only two things we can say occurred that needed to be updated on is the fact that Judge Barber has, since the filing of this case, issued a temporary restraining order and I have a copy of that which we –

(Judge Rives): Hasn't Judge Barber actually issued a temporary injunction in this case?

(Mr. Smith): A temporary injunction, yes, sir, I am sorry.

(Judge Rives): Which is appealable as I understand under the Alabama law.

(Mr. Smith): All right, Judge Barber has issued what has been marked as Plaintiff's Exhibit 6 and since that date on or about the 29th day of May, 1973 and on or after the first day of June, 1973 the theatre has been closed continuously since that time. And I think there is no question about it since it is right across the street from the courthouse. However, the complaint – the order upon prayer for a temporary injunction is new and the fact the place has been closed since that time is new and other than that I will address myself now going into the law rather than to rehash the facts (T. 44) if the Court please.

(Judge Rives): Let me ask you about your case in the Supreme Court, the Pursue case. What is the present posture of that litigation?

(Mr. Smith): Your Honor, First Mr. Clancey with whom Mr. Johnston is affiliated and Mr. Hoffman for the State of Ohio, the prosecutor, filed a writ in the nature of a mandamus and they also filed a motion to expedite briefing and they filed a stay request with Justice Stewart – Mr. Justice Stewart and Mr. Justice Stewart prior to, as indicated in our memorandum, prior to the time the Supreme Court ruled on the so-called obscenity and pornography cases on June 21, denied the stay and on June 25 I think the Supreme Court denied the application to expedite the filing of response and also Justice Stewart submitted to the whole court the question of whether or not the stay in Pursue should be granted because of the whole court's action and the difference in the majority and minority opinions, I trust, and as a result the whole court without exception denied the stay.

(Judge Rives): But just without opinion.

(Mr. Smith): Without opinion and then we (T. 45) had filed by the same parties a jurisdictional statement addressed to the question of the judgment in proper form, let's say it wasn't an extraordinary proceedings –

(Judge Rives): The Court noted proper jurisdiction?

(Mr. Smith): No, they had not because it was done after the court had recessed for the summer and we filed a motion to dismiss or affirm –

(Judge Rives): There is not much chance of that case being much help to us on the most critical issue of whether we should remit you to the State Court.

(Mr. Smith): No, sir, in all honesty the posture of that case doesn't help us at this time. The Court had asked us to respond to the application for mandamus which is separate from the first filed and we are now in the process of doing that.

The thing I think is helpful to our position, at least I so interpret it is the Supreme Court decision on the 25th as they relate to a series of cases, one of which two of the members of this court sat on and that is the Grove Press versus Bailey and this court (T. 46) remembers there was a dissenting opinion by one of the judges in this case in which he felt an extension was improper and felt that the statute should be –

(Judge Rives): That was sort of a boiler plate vacation –

(Mr. Smith): Yes, but the significant thing is, sir, that case was filed in the U. S. Supreme Court and I have a copy of the jurisdictional statement filed in the United States Supreme Court October 13, 1970. Many cases were disposed of by the United States Supreme Court after Younger versus Harris but this was not one of them sir. This was not one of them. This one waited until we got to the merits and when it got to the merits, when they vacated Grove Press versus Bailey and sent it back to this court they did not – when they vacated it and sent it back to this court for reconsideration and further proceedings in light of Miller, in light of Heller and the other cases involved. So it was sent back on the matters of substance and not sent back for Younger versus Harris for abstention or Houston versus Berryhill or any of these matters and, Your Honor, there were approximately eleven cases in the 68 cases disposed (T. 47) of on June 25, 1973 which involved Three Judge Courts and

which the Three Judge Courts may have found against the moving parties and all of those, Your Honors, they did not send it back for Younger versus Harris but sent it back for matters of substance and we say that is significant and that is important and that is of help to our position, the way we interpret it.

May it please the courts, in this case unlike the other case, what we have here the basis for Mr. Jenkins moving forward in the State Court primarily and that is the case in which Judge Barber's order has been entered and which the theatre is now closed was that the operator of the theatre, an individual who was there operating it had been convicted multiple times in the State Court and they brought in judges for the hearing – some of the judges who said yes, we convicted him. That was Chester McKinney. However, none of Mr. McKinney's convictions were final or any of the other members that were working there, their convictions were final or have been finally disposed of by all courts to which they have been addressed. But what we had was because Mr. McKinney sold (T. 48) was convicted of publications A, B, C, D and E, that is enough to say they are repeated violations and has convictions in those cases are on appeal and now we are going to close the premises because of the repeated violations of the law.

So it cannot truly be said that this is quasi-criminal in nature as an ancillary aid because there is now the double jeopardy factor, they are coming back the second time around and punishing him for what he is supposed to have done the first time and that makes a distinction and a difference we suggest which is not in the case of General Cinema.

May it please the Court, and counsel, we say that Judge Barber's order if literally read puts the onus on any individual who would choose to operate the corporate location this way. It says, the court finds that, as alleged, there have been numerous and repeated past violations of the laws and statutes of the State of Alabama and the ordinances of the City of Birmingham, Alabama, which govern, control and/or apply to the operation of the said motion picture theatre and book store, all in a manner such as to constitute a nuisance. And then it goes (T. 49) on to say, accordingly it is considered, ordered, adjudged and decreed that respondants, their servants, agents or employees are each hereby separately and severally and conjointly and temporarily enjoined from further maintaining such nuisance and any further maintenance thereof or any violation of this order shall constitute an open contempt of this court. And it also said respondants are further enjoined from removing from the premises any and all personal property therein, or the interference therewith. So, a padlock was put on and nothing was taken out and nothing can be put in and nothing can be sold unless you are willing to say I think that this may not be obscene. Now, that is one of the things that the Supreme Court criticized about a statute which is not specifically precise. That is to say individuals should not at their peril engage in which is called self-censorship because if someone is going to be placed in a position of having to engage in self-censorship then the public is the loser. This is the rational of quantity of books versus Kansas, Marcus versus Search Warrant and all of these cases in essence they said the same thing and that is of (T. 50) course why the U.S. Supreme Court has suggested instead that cases relating to prior restraint bear a heavy presumption against constitutional validity. There must be a great and gave showing of validity.

Now, we have here the state or Mr. Jenkins utilizing a law that was originally called the Red Light Nuisance Abatement Action where any act, any single act of prostitution is a violation of the law. No question about that. And if you are going to arrest someone today for engaging in prostitution you can arrest them tomorrow if they are back at the same old stand so the State Legislature has given a tool to the courts at that time that would relate to this kind of problem. But can it be said that every single book and every single movie and every single magazine is going to be obscene under this law, the State of Alabama Obscenity Law. We say that it cannot be conceded in advance it is going to be in violation of the law.

Now, we are not saying that there is no remedy for the punishment of the abuse of the First Amendment and that punishment is criminal prosecution. And if we are wrong, if the plaintiff in this case is (T. 51) wrong or its agents, servants or employees are wrong they are going to have to go to jail sometime.

(Judge Rives): You have certainly got a very strong argument if we reach the merits of the plaintiff's case.

(Mr. Smith): Yes, Your Honor.

(Judge Rives): The strong question in my mind is whether you are entitled to a Federal hearing or whether you were not already before the State Courts and were not restricted or at least all of these questions could have been decided in one case, one hearing before the State Court and one final decision by the State Supreme Court.

Where can we grant you any more – save you from irreparable harm any more than the State Supreme Court?

(Mr. Smith): Judge, you could attach the order today and the State Supreme Court could not attach the order today. That is one point.

(Judge Pointer): Why?

(Mr. Smith): Because the issue is not in the State Supreme Court.

(Judge Pointer): Why couldn't it be?

(T. 51) (Mr. Smith): Because it is not there.

(Judge Pointer): Is it an election you have made?

(Mr. Smith): No, sir, we address ourselves to this court lest we lose Federal jurisdiction. And I cite Medical Examiners versus English and it is clear that we cannot play both sides of the street at the same time, Your Honor. When we were forced to go to the temporary restraining order hearing or injunction hearing we did invoke the doctrine of England versus Board of Medical Examiners and for us to be aggressive and move forward in any court while this matter is pending may very well under case law constitute an election. So for that reason our election was to go forward to the Federal Court and lest we do anything in the State Court which might be interpreted to our disadvantage we certainly have not for that reason.

(Judge Pointer): Isn't the time of testing the time you bring your litigation in Federal Court?

(Mr. Smith): How do you mean, sir?

(Judge Pointer): The question of whether you are entitled to be in Federal Court and get relief (T. 53) in the Federal Court is essentially directed to that of the matter at the time you attempt to come in the Federal Court.

(Mr. Smith): In criminal cases. Absolutely. But not so in quasi criminal or whether we call it civil. This is different. It is an entirely different proposition. This court may be familiar with the case of Mitchum versus Foster which is my case in the Supreme Court. There the same thing occurred in which they attempted to close the entire premises. The question presented in that case was does the anti-injunction statute bar the Federal Court relief in such cases. We addressed ourself to that question and argued that question and the court said that under those cases involving bad faith enforcement of the law or irreparable harm, the anti-injunction statute doesn't apply.

(Judge Pointer): I understand in the Mitchum case no subsequent action had been taken in Florida since the remand by the Supreme Court?

(Mr. Smith): No subsequent action has been taken by virtue of the fact that counsel agreed that the premises could continue to operate and that no further action would be taken by the State and we (T. 54) did at that time decide to await the outcome of Meyer versus Austin and at that time nothing more has been done and for lack of business the store is closed and for no other reason.

(Judge Rives): In the Mitchum case Justice Stewart as I recollect concluded his opinion by saying the questions of

federalism and comity under the Harris versus Harris case still remain?

(Mr. Smith): That is correct.

(Judge Rives): And then I believe the Chief Justice had a special concurring opinion in which he suggested that the District Court should decide how far the Younger and Harris cases went?

(Mr. Smith): Applied to civil cases. And now they have that opportunity by virtue of the case out of the Fifth Circuit which is Hobbs versus Thompson now entitled Sibyl versus Thompson on which the court has noted jurisdiction and which briefs have been filed and which the matter will be argued sometime I would suppose this fall. Hobbs versus Thompson is now Sibyl versus Thompson.

(Judge Rives): As to the actual jurisdiction and power to enjoin, personally I don't have much (T. 55) doubt since the Mitchum case, you could enjoin a court itself. As a matter of fact the Middle District of Alabama made a declaratory judgment about admitting an attorney had to be addressed to the Justices of the Supreme Court. But we should avoid that kind of conflict whenever we possibly can but we couldn't avoid it in that instance.

The critical thing that worries me about this case is the Younger-Harris doctrine and companion cases and whether you are not in a position to get everything decided in one decision by the Supreme Court of Alabama.

(Mr. Smith): Well, Your Honor, I would agree with the Court's observation or at least say the observation has

substantial merit but in essence what I am saying, Your Honor, is had it not been for the Supreme Court taking these State cases, State Law cases pending in the Federal Courts and vacating and remanding those in light of Miller and in light of Paris Adult Theatre, I could say that is probably correct but how else can we interpret what they have done there except to say that they did at least in every one of those cases, Your Honor, particularly (T. 56) the Grove Press versus Bailey case and I think the M & W Theatre and a case out of Arkansas I think the United Theatre versus Thompson had more vantage on it than Grove Press versus Bailey and these were pending all these years – in 1970 Mr. Frierson Graves said he had a case pending and I only point out to impress on the court these cases were pending in the United States Supreme Court at the time of Younger versus Harris being disposed of and at the time of all the other cases that were in that series. So, we say, Your Honor, that when we have a law that presents the question of whether or not it is constitutional or unconstitutional we presented that question and that is by virtue of the Federal constitution and that there is no state construction at this time, Your Honor, which will avoid the Federal constitutional questions.

(Judge Rives): The State Nuisance Abatement Statute never has been construed to apply to theatres or book stores, have they?

(Mr. Harris): No, sir, there is pending no construction of the State statute which would avoid this Federal constitutional question that we present (T. 57) here and we say that secondly we have –

(Judge Rives): Wouldn't be avoided by construction saying that it had no application to book stores and theatres?

(Mr. Smith): But what do we do about the irreparable harm aspect? The irreparable harm alleged is the fact that the store has been closed and the store is the facility and under the manner it has been done here the store is closed and really we can't even sell Goldilocks unless it might be construed as being obscene by someone or some party. So we have irreparable harm. Most of these cases do not present a question where the parties have sort of gone into a dance and a standoff and they are letting it even go up to a Federal Court and then the Federal Court says O.K., we see no irreparable harm, no bad faith enforcement of the law and there is no harrassment and they sent it back and said we have no jurisdiction and then the parties resumed the fight. It is sort of like a time-out in a football game. Here we don't have that. We have an order here that closed the facilities and every single day there is irreparable harm continuing.

(T 58).(Judge Pointer): And you take the position in the Birmingham case there is no appeal rights to go to the Supreme Court? Is that part of your assumption about irreparable harm? I thought I understood you to say –

(Mr. Smith): No, we say it is the choice of the forum. Your Honor, when we realized that Mr. Jenkins and Mr. Morgan were moving to close up the facilities in town we sought to bring an action as quickly as we could. Now, we certainly could not know the day before they filed that they were going to file and so we could win that race to the courthouse door. So it is only in this situation we could have done it, and that is why the election –

(Judge Pointer): I thought in your opening statement you made some reference to having received advice of local counsel to the effect you had no right in going to the Alabama Supreme Court.

(Mr. Smith): I did and now Mr. Ritchey tells me that I misstated the proposition.

(Judge Rives): You think the election of forum rights applies even in the face of a pending case –

(T. 59) (Mr. Smith): Pending Civil procedure. Otherwise, Your Honor, what would an anti-injunction – why would the – strike that.

There was a recent case and I think it was in the last edition of the Criminal Law Reporter in which the descent of the judge on the Third Circuit I believe was to the extent what good is the anti-injunction law or the exceptions to the anti-injunction law under the Civil Rights Act because if there is a pending proceeding you can't, because of comity and federalism, you can't go forward and what is the effect of having exceptions. And, in essence, we can't anticipate filings, filings made and elections made and the way it is the law is clearly unconstitutional if as applied to motion picture theatres or book stores for conduct which has not yet been engaged in, that is to say, stopping us from selling books tomorrow or exhibiting a film tomorrow.

The U. S. Supreme Court approved in Paris Adult Theatre, which is my case, the procedure whereby Georgia stopped the showing of a single film on the ground of its alleged obscenity and in fact they even commented that that was probably a better (T. 60) procedure than we have in

criminal law so that once the Civil procedure was operative, no one could thereafter complain as to that film and that theatre, that they had not been forewarned of the possibility their conduct might be criminal. They specifically approved as to one film in the theatre. We are not dealing with one film in the theatre. And in addition to that in the Mobile Book Mart there is a concessionaire operating the book store in the theatre and they were not even named as a party to the suit and yet Judge Barber gratuitously included them in the order that he signed after this suit was filed saying that nobody could remove anything from the premises.

(Judge Rives): They can't send out any books whether good or bad?

(Mr. Smith): That's right.

And, so, Your Honor, in the case with irreparable harm, we don't have the federalism comity concept that we have because the Supreme Court has said over and over again, what does irreparable harm mean? Is somebody supposed to execute the operator of a theatre and from which he cannot come back to life. The theatre is closed and has been closed.(T. 61) That is irreparable harm. If those magic words have any meaning at all in its application to the Civil Rights Law we say it applies here.

Thank you. I would like to have a minute or two to comment on anything my adversary might bring out.

(Judge Rives): We will give each of you five minutes for rebuttal.

Before hearing from the defendant we will take a ten minute recess.

(Court was in recess from 11:20 A.M. until 11:35 A.M..)

(Judge Rives): All right, Gentlemen.

(Mr. Smith): May it please the Court, I have one thing I would like to clarify that I brought out.

Mr. Ferris Ritchey, my local attorney, has checked the law and he tells me that one cannot appeal a temporary injunction in Alabama unless one files a motion to dissolve the injunction and that can be appealed which means we would have to take affirmative action under the election theory.

(Judge Rives): All right, we will hear from the defendants.

(T. 62) (Mr. Manning): If the Court please, I am Glenn Manning from Huntsville and I am associated with the City Attorney who is appearing also by himself as he is a defendant in the case.

(Judge Pointer): He is not the Younger brother –

(Mr. Manning): No, sir, not the same Younger.

I shan't go much into the facts as they have already been covered generally.

Apparently there have been some issues raised in the briefs, however, on the part of the plaintiffs there has been

filed in the case Mr. Sweeton's status, whether or not he is a private citizen or whether he is the Chief of Police. Well, of course, he is both. Mr. Sweeton obviously I think would have filed this suit in his capacity as Chief of Police which he did not although it appears on the face of the complaint in the State Court – He didn't appear as the Chief of Police. That was for the reason under the statutes in question a Chief of Police in his official capacity cannot bring a proceedings of this nature. That is under Section 1093 I believe of Title VII which authorizes the Attorney General or (T. 63) a solicitor, his assistant or deputy or prosecuting attorney or any citizen or citizens to bring a suit of this nature upon the relation of the Att rney General or upon the – in the name of the State of Alabama. We are not contending that Mr. Sweeton acted purely on his own initiative but it was necessary for him to file as a private citizen and we have alleged that he filed this as a private citizen but we alledged he filed it as a private citizen simply in the context of the statute. That is what it amounts to.

I think, if the Court please, we have to consider what are the real issues in this case. First, in connection with the trial court's decree, there has been some discussion as to whether or not the trial court correctly construed Title VII, Section 1019, pursuant to which these proceedings were brought that is, whether or not this is one of the places that is mentioned in the statute to which a procedure in Article II, Title VII applied. We submit that that is a question purely of State law. It is a question which has not been decided by the appellate courts of that state. For the purpose of this proceedings (T. 64) the trial judge, the State trial judge must assume to be correct. That would then bring us I think to the real issue which is whether or not the proceedings and here we agree

with the plaintiff, as to whether or not the procedure set forth in Article II, Title VII meets the constitutional requirements, the requirements of the Federal constitution, and in particular the requirements of the First Amendment?

Now, I know that in the complaint it appears to be anyway and also in briefs filed by the plaintiff it appears as kind of a side issue. There is some contention of due process or something of that nature. We submit that that is not an issue at all in this case. Here the proceedings in the State Court – well, there is no prior restraint. There was an adversary proceedings although the chapter in the code to which – pursuant to which this action was brought in the State Court provides for certain things which frankly some of them I have doubts about. There is a provision there for example as to the admissibility of general reputation of the premises and that makes a prima facie case. I question the validity of that provision myself.

(T. 65) (Judge Rives): No prior restraint as to the pictures been shown in which the court has had an opportunity to view certainly and has viewed would be no prior restraint. Supposing they show completely and in confiscating the projection machine, is that prior restraint on any future pictures?

(Mr. Manning): Your Honor, I will get into that if I may. I was referring to prior restraint, Your Honor, prior to an adversary hearing on the merits on the State trial court.

(Judge Rives): Adversary hearing as to certain particular pictures but as to pictures in general and also the taking the property out, it is difficult for me to see how you don't use

sort of a sledge hammer approach in getting the prior restraint.

(Mr. Manning): Well, that, of course, Your Honor, is after an adversary hearing and establishment of a course of conduct. I think that would be my reply to that.

(Judge Rives): Under the Mitchum case the Federal Courts in 1983 could enjoin you from judicial actions.

(Mr. Manning): Your Honor, we are not contending (T. 66) that power doesn't exist in the courts. I don't think we are contending that. We do contend and really we are getting off as to whether or not this court should interfere which I think frankly is the main issue before the court or at least it is the first big issue that has to be crossed. We are really getting down though I think –

(Judge Rives): I thought you were arguing though that there is no – construing the State statute the statute doesn't provide for prior restraints. It looks like to me it is full of prior restraints.

(Mr. Manning): Well, it does, sir, provide for prior restraints and it provides for preliminary restraining orders but we didn't get one. We didn't apply for one. It provides for the introduction of evidence of the reputation of the place. We didn't introduce it and we offer no such testimony. We didn't do those things, Your Honor, deliberately. It provides for temporary seizure of the property before an adversary hearing and the making of an inventory by the sheriff. We didn't do that. There was no restraint. These theatres were open until after a full dress trial and the final decree.

(T. 67) (Judge Rives): And then they were closed?

(Mr. Manning): Yes, sir, that's right.

(Judge Rives): I think you are right, we are down to the Younger –

(Mr. Manning): Yes, sir. Of course, the defendant said, Your Honor, you have to get into the merits in order to get – because it has some application under Younger. I think it has some bearing under the irreparable harm and injury aspect of the Younger test which has been mentioned by counsel by the plaintiffs. It is my understanding within the meaning of Younger and the related cases that irreparable harm and injury has to do with – as to the interest to be protected, that is, to the constitutional interest to be protected. It has to do in this case with First Amendment rights. It doesn't have anything to do with the fact they are going to lose money. It has to do with First Amendment rights and that is what we are here for. That is what we mean I think by irreparable harm and injury. Are the First Amendment rights of the plaintiff, would they be unreasonably interfered with – assuming you get to the merits, would they be unreasonably interfered with by the (T. 68) action of the State Trial Court?

(Judge Rives): Is there any due process question here or over-breadths of the statute as applied – the 1919 statute that lewdness has not theretofore been taken to mean obscenity?

(Mr. Manning): I don't think there is any question on over-breadth.

(Judge Rives): Where they had sufficient notice that the statute could be applied this way?

(Mr. Manning): I would like to comment on that, Your Honor. This statute does not create or define an offense. This statute merely provides a remedy.

(Judge Rives): It does have some civil penalties that are pretty severe, confiscating personal property.

(Mr. Manning): Yes, sir. But the procedure, Your Honor, that is set out in this chapter is almost identical to that – to a like chapter that pertains to a liquor nuisance. It is almost identical to the State statute on liquor nuisances. And this at common law is a place of – a disorderly house and a house of prostitution, a house of assignation. They were public nuisances. The persons who maintained such (T. 69) nuisances could be prosecuted criminally. By the same token a person who falls within the scope of Section 1091 of Title VII can be prosecuted criminally. It is an additional weapon in the arsenal of the State to control the kind of places named in the statute. That's all it amounts to.

Lewdness is defined by common law and is kind of a word of art. The word lewdness as a matter of fact was involved in the federal statute that was concerned in the Roth case. The question of what the word obscene means was involved in the Roth case. The Supreme Court held that they may violate the statute. I don't think that is at issue here. I think for this court the issue is one of whether it is the kind of case where this court should intervene and on that I think we are in agreement with the plaintiff here. I would point out, Your Honor, that looking at the court's decree it has two

aspects, one aspect has to do with the closing of the premises and that is the in rem aspect.

The second aspect has to do with the in personam and is a permanent injunction, not merely (T. 70) to not violate the law but a showing of obscene movies at this particular place but also anywhere in Madison County.

So I think this court has to look at that way too, namely it is a two pronged decree so to speak. Now, with respect to the aspect of the decree which closes the premises although it is a drastic remedy it is also a remedy which has been used I guess in every state in the Union in certain types of nuisances, public nuisances. It has been used in connection with illegal sales of liquor. It has been used in connection with maintenance of houses of prostitution. In other words that remedy, although drastic, is used.

(Judge Rives): But those things didn't involve First Amendment rights.

(Mr. Manning): No, sir, they didn't. They involved property rights. And basically that is what we are here on today, Your Honor. Although the United States Supreme Court has held that motion picture theatres, the operators have First Amendment rights, they haven't said and in fact there has been indication otherwise I think that the interest, although (T. 71) where you have two interests, both of which are entitled to protection but may not be entitled to protection to the same degree. A motion picture theatre wouldn't be entitled to the same protection as a newspaper. Primarily it is a commercial thing and up until a few years ago it was held that they had no First Amendment rights

whatsoever. They now have First Amendment rights but they do not have First Amendment rights to the extent, Your Honor, that say a newspaper would have simply because they do not normally – are not normally used to express ideas. The showing of fornication, sodomy and that sort of thing possibly might be said to have the pushing of an idea but to me that is hard to say.

(Judge Rives): You draw a distinction between the book store that is involved in the M.T.M. case.

(Mr. Manning): Frankly I would.

(Judge Rives): You would?

(Mr. Manning): Yes, I would. I think generally speaking – well, certainly you can have pronography in books and you can have pornography in pictures but I submit that the impact on the individual concerned (T. 72) who looks at both, the pictures in full living color in a darkened theatre on a wide screen has a heck of a lot more impact than picking up and reading some words that describe the same act. I think from the standpoint of the State there is a difference.

(Judge Pointer): Let me interrupt you a moment.

A few minutes ago you said that the real question as you saw it was whether this court should interfere or intervene and you followed that with the statement on this point you thought you were in agreement with the plaintiffs. Now, I am confused –

(Mr. Manning): As to what the issue was. I was referring to the issue. I am certainly not inclined to agree with them on their position.

But I would ask the Court to bear in mind Number 1 that insofar as the closing of a theatre essentially what we are concerned with is property rights. As far as exercised First Amendment rights and therefore irreparable harm and injury from that point of view to the rights to speak freely, the plaintiffs are restricted in their speech under the decree, assuming that the showing of dirty movies is speech. They are restricted in only one place in the (T. 73) State of Alabama that we know about. They are certainly restricted in only one place in Madison County Alabama. They are restricted on the lot on which the theatre is located. Anywhere else in the county insofar as the in rem aspect is concerned they are perfectly free. They can engage in any business they see fit at any other location in the county up to and including motion picture theatres.

Now, with respect to the in personam aspect, and we consider that a closer question, Your Honors, or at least I do, as to the in personam aspect they are enjoined not to show obscene movies. That is the effect of the decree and it is very carefully confined to that, both at the location where they have been showing them and anywhere else in the county. Now, that decree, Your Honors, does only one thing, it tells them they have to obey the law as defined in Roth. It goes further and says that they have to obey the law according to any future definition of obscenity by either the State or the Federal appellate courts. What it boils down to is they are simply ordered not to violate the obscenity statutes by showing obscene movies.

(T. 74) (Judge Rives): Instead of the remedy being prosecution in a criminal case, they would be brought before the judge for contempt of court?

(Mr. Manning): Yes, sir, and there, if Your Honor please, you have that in any contempt case. You have that in the liquor nuisance proceedings. The man gets a full adversary hearing and he gets notice of what the charge is in advance and under Alabama law the most he can be punished for one violation is a $50 fine and five days in jail whereas if he is prosecuted criminally and convicted the penalty is hard labor. He gets a full hearing on full notice. He is not automatically thrown in jail because somebody makes a charge.

(Judge Rives): Of course, you still don't get much light on the application of the Younger principle?

(Mr. Manning): No, sir.

(Judge Rives): That is what I think the court wants to know.

(Judge Pointer): Is there a division of time between counsel relative to Mr. Younger?

(Mr. Manning): Do you want to handle that aspect?

(T. 75) I will just let Mr. Johnston take that aspect, Your Honor.

That's all, thank you.

(Mr. Johnston): May it please the Court, Al Johnston is my name and I am from Biloxi, Mississippi appearing in the

trial of this case in Huntsville and now appearing before this panel representing the defendants in the General cases and the other cases.

If I might briefly outline my position and then go into it a little more in detail.

Three basic points, the court really does not have jurisdiction in this matter. Younger versus Harris and Mitchum versus Foster preclude Federal intervention in this case and the recent Supreme Court decision in June, 1973 gave further emphasis to the claim that we have that there is no substantial Federal question here. In summation it is the case where the Federal Court lacks power to interfere.

Now, we have heard considerable discussion about what has taken place. In the Huntsville cases we had three theatres closed by final decree for courses of conduct which were documented in the record here by time and motion studies as the showing of (T. 76) obscene film, films which are obscene as a matter of law and as a matter of fact there was no proof to the contrary offered by the defendants. There was no contention by the defendants that they were showing anything but obscene films nor did they offer the court any suggestion or evidence that they ever intended to show any nonobscene film.

So as far as the First Amendment claim is concerned or any presumption that it may have been at one time afforded to the defendants or the plaintiffs here, the presumption has to give way and yield to the facts. We have a situation here where admitted pornographers are coming to the Federal Court to appeal a State decree closing and putting them out

of the pornography business. That is all we have. And they are doing it under veil of the First Amendment which as the Supreme Court has said repeatedly does not afford any protection for obscenity.

Now, the court has asked several questions of counsel, one dealing with the question of whether this court can construe the Alabama Statute and has there been any kind of election made or can't the same relief sought here be afforded to these plaintiffs (T. 77) in the State Court if they had so chosen. Now, as I recall Judge Pointer's recommendation to counsel at the time the case was originally before him some months back, he said he would recommend seriously and strenuously that the plaintiffs here pursue their cases in the State Court of Alabama and it was left at that and then on the last day one of these plaintiffs here, the General Corporation did file a notice of appeal and no other appeals have been taken and I submit to Your Honors that this system of law that we have in the United States with the State Courts and on the other hand the Federal Courts contemplates that a person, once he is involved in one court system, the state system, doesn't hop back and forth where he thinks he might be able to get the best remedy. There is a good reason for that, that the – although we have ascerted here 1983 jurisdiction which is Civil Rights cases, all the history of the litigation and all of these cases interpreting it, 1983 is Civil Rights litigation.

This asserted rights under the First Amendment of the constitution for pornographers which is minority law, admittedly Mr. Justice Douglas believes (T. 78) as Mr. Justice Black believed that First Amendment even protects obscenity

but that is minority law. That is found in dissenting opinions rather than majority opinions.

We have people in this court today one step removed, at least one step removed from the arena wherein all these photographs were shown, the films were viewed by the judge where they were not challenging our contentions that they were showing obscene movies. They were not coming into court under the provisions of the statute which permit them to come in and say, Your Honor, we are not going to keep that up. We are going to use these premises for other than obscene films. They have never made that contention and now they are coming into the court one step removed where they don't have the same judge looking at that evidence and they are telling Your Honors but there is a presumption that one day we may decide to use our premises for other than the showing of obscene films or films which are obscene as a matter of law; films which there could be no disagreement and we think this takes the case out of that realm of First Amendment protection.

(T. 79) (Judge Rives): You would argue then that this case, the question before the court applies only to such an extreme case as showing nothing but obscene pictures and never intending to show anything but obscene movies?

(Mr. Johnston): That is our position. Your Honor, we have an extreme case.

(Judge Rives): But I don't think there is any such thing involved in the MTM case.

(Mr. Johnston): The MTM case – Your Honor, I am really not in a position to argue that but it is my understanding

after a repeated, a series of repeated criminal convictions showing a course of conduct, it was felt that this course of conduct could be stopped by an injunction proceedings similar to what we filed in Huntsville but our position is that when an individual shows by his course of conduct and doesn't claim anything to the contrary –

(Judge Rives): He would have to make an affirmative statement that I am going to run this thing on a clean picture basis?

(Mr. Johnston): At least that. There is a provision in the statute which permits him – this (T. 80) was the finding in the final decree, the court in this Paragraph 4, the court finds the respondants are operating the theatre so as to constitute a public nuisance under the laws of this state. No intent was shown by the respondants to operate their place of business other than as a public nuisance nor that they ever operated such theatres in other manner. Of course, they failed in that regard and they also now claim that they are put under some kind of onerous burden because they are under the threat of contempt. We would still have a burden if we were going to charge them with contempt or cite them for contempt. We would have the burden of showing that if they came in and showed some other movie that that movie was obscene. It wouldn't be an automatic thing. They would have a hearing again and we submit that the case of Near versus Minnesota, which they have cited is a different type of situation. It was a case decided long before the Roth case and even before these later developments and the history of what in the obscenity area and we don't think that – and even in the Near versus Minnesota case there was contemplated by the court an extreme kind of situation and there was a sort of a prediction

(T. 81) possibly you might say that maybe under certain circumstances certain factual situations, there might be a different result.

(Judge Pointer): Let me ask this. Do you take a different position that if a nuisance proceedings in a State Court had absolutely no appellate rights in the state?

(Mr. Johnston): If there was no right of appeal – well, I would have to think about that, Your Honor, but knowing that there is a right of appeal I can't say that I would – if they had nowhere else to go I might take a different view about it. I think that a person should not be denied some form of remedy but I don't think under these facts where they could go back to the trial court for instance with an assertion that anytime within the year period they could go back with the assertion that we are going to show clean movies and further that they could have appealed the case.

Supposing we didn't have a right of appeal and only had that right to go back to the court and say we are going to change our course of conduct. I would say there would be a remedy there that would (T. 82) preclude them coming into Federal Court. They wouldn't have exhausted what they could do in the State Court. So under certain circumstances as I say, for instance if they refused to use the remedy they had in the State Court, even though they didn't have an appeal, they would be precluded. I don't think in our system we contemplate a person just hopping back and forth and using up the courts for matters which to my way of thinking are really frivolous matters where a person has a record of doing nothing but violating the law and –

(Judge Pointer): Are you aware of any form of supersedeas that the plaintiffs in this case could have utilized in the State Court pending appeal?

(Mr. Johnston): Well, Your Honor, I am aware of this, that the stays are granted by courts all up and down the line, the trial courts and the appellate courts in all systems for meritorious cases. Where you can convince a court that the stay ought to be granted for certain reasons then you can get a stay. No stay was ever applied for and they just come in and said we couldn't find out a way to get a supersedeas. I don't think they really explored that to the extent (T. 83) they might have because I think that had they been able to assert with some conviction and convinced the court anywhere up and down the system of Alabama law, Alabama jurisprudence that they had a meritorious case, I think they could have gotten a stay. But I don't think they are in a position to urge that in Alabama. They couldn't urge it upon Judge Snodgrass who wrote the final decree because Judge Snodgrass as I said included this Paragraph 4 in his final decree which states the court finds the respondant has operated a theatre so as to constitute a public nuisance and no attempt was ever shown to the contrary.

Now, Mr. Smith was asked about the status of the Huffman case or the Pursue case in Lima, Ohio. It is my understanding that the court has been furnished a copy of our petition for mandate in that case, is that correct?

(Judge Rives): I haven't seen it.

(Judge Pointer): I am not sure we got the copy of the petition but we may. I think we are all familiar with it.

(Mr. Smith): I did not furnish a petition for mandate but I only furnished the motion for stay (T. 84) made by your co-counsel but the mandate was a little too big and we didn't make copies.

(Mr. Johnston): The mandate is big, Your Honor, because it includes all of the records – all of the exhibits. A mandate is, as you know, a little bit unusual. You don't necessarily have a printed record going up so we included all of the orders in the courts below and some of the evidence.

(Mr. Smith): And the time and motion studies.

(Mr. Johnston): The time and motion studies of films which had been shown at some of the theatres in Lima, Ohio were included but not all of them. But the petition for mandate itself is less than 80 pages.

In that case a parallel appeal was filed subsequent to the petition for the writ of mandate and during recess of the court, the recess of the Supreme Court but just on September 18 the defense counsel, Robert Eugene Smith, who is appearing today for MTM was notified to respond to the petition for writ of mandate and he has already filed a motion to dismiss affirming the appeal but he was directed by the Supreme Court ot file a response. The same direction was also given to the solicitor general, the Honorable (T. 85) Robert H. Schwartz and the court has directed this office to request that a request be filed in this case and it is in the petition for writ of mandate case. The relief we asked for in the petition for writ of mandate in the Supreme Court of the United

States was to expunge from the record the Three Judge Court's order in the Pursue Limited case and to remand to the State of Ohio the case of Huffman versus Dakota et al. And what has happened in the Federal Court there, the Federal Court has remanded those cases and today, October 4th, 1973, Mr. Smith's co-counsel, Mr. Gilbert Deitch informs me is arguing or is appearing in the State Court in Lima, Ohio.

(Mr. Smith): That has nothing to do with the cases that he is talking about. That is a criminal case.

(Judge Rives): Mr. Johnston, you have had a little over thirty minutes now. You should bring it to a close within the next few minutes.

(Mr. Johnston): All right, sir, we will do that.

Now, reference has been made to certain cases in the Supreme Court of the United States which (T. 86) are special cases, cases which are unusual and not like the present case. For instance, Quantity Books and Marcus and Dombrowski, these are special circumstances. Dombrowski, for example, was bad faith and harrassment and there is no evidence and no assertion there has been any bad faith in enforcement of the state statutes and Marcus and Quantity Books dealt with search and seizure and different problems that aren't involved in these cases. So I don't think that any referency to those cases is going to help the court here.

Further the ultimate question I think is the type of restraint which is imposed in this case is not on anything which is today, entitled to any First Amendment presumptions because the facts have over-ridden that and the presumption has to give way to the facts. So that even though in the Mitchum versus Foster case, Mr. Justice Burger in his concurring opinion said the court holds only that 2283 which is an absolute bar to injunctions against state court proceedings in most suits does not apply to a suit brought under 1983 seeking an injunction of state proceedings. But it is the court's opinion as noted (T. 87) it does nothing to question or qualify in any way the principles of equity, comity and federalism which must restrain a Federal Court when asked to enjoin a State Court proceedings.

So we have the principles of equity, comity and federalism which enable this court to abstain or decline to take jurisdiction and further we have the proposition as I asserted which was not brought out in a nuisance case, wasn't urged in it that this is not a 1983 case in the first place. This is not a Civil Rights case. This is a case of a pornographer coming into court claiming First Amendment rights to which he is not entitled.

(Judge Rives): Thank you.

(Mr. Jenkins): Your Honor, I am Herbert Jenkins, defendant in the case of MTM versus me and I wish to point out to the court the action that was made the basis of this

suit in which I am the defendant was by the State of Alabama on my relation. I represented them as attorney because the State statute under which we proceeded authorized the prosecuting attorney to do so in these type of cases. There are other abatement laws and in particular the City of Birmingham (T. 88) itself has an authority under a separate statute to abate nuisances. Under those statutes they don't mention lewdness as such and they just merely talk about a nuisance and the abatement of such.

So we elected in view of the numerous convictions being rendered against the defendants in the cases I brought or their agents or servants and the repetitive nature of them and the indication that they were never going to cease and the sameness and the similarity of all the films led us to construe that the action that we took would be proper. So the question now is whether it is or is not. Now, who is going to decide that issue?

Of course, in bringing this case over here and making me the sole respondant, I think is lacking in that they are indispensable parties. The State of Alabama of course should be a party, Judge Barber should be a party and any relief they are seeking against me would be totally ineffective. And I don't think it would justify this court in rendering it.

The action in essence is an action against the State of Alabama. The question of determining (T. 89) whether a suit is against an officer of the State and I acted as an officer of the state by following the provisions of the statute, is actually a suit against the state and you have to determine the question whether or not the relief sought would be against the government. So all they are trying to do here is stop the

government from enforcing its laws against them. It isn't against me as the attorney who processes it through court.

So the cases are abundant on that. I didn't cite any particular cases but there are similar cases on that point concerning the United States in Larson versus Domestic and Foreign Commerce Corporation, at 69 Supreme Court 1457. And then there are cases involving states where they determined whether or not the suit was actually against the State or an officer. In order to be against an officer alone he has to do something ultra vires or outside his authority and not simply just to do something that may be under a statute that may be unconstitutional.

In that regard you get back to the same question, if they are indispensable parties and the relief is being sought against me, I should be dismissed (T. 90) anyway but if you get past that and decide to consider the other question and leave me in and try to remedy some relief against me, then you've got to go and consider the principle in Younger versus Harris, the principles of abstention, the principles of immunity of a prosecutor. As a prosecutor I think the cases in the Fifth Circuit are clear that a prosecutor has immunity and so I cited those cases.

(Judge Pointer): Aren't there some claims for damages rather than injunctive relief?

(Mr. Jenkins): Well, there would be if it was solely for damages. I think the cases are generally referring to damages but there are other cases, particularly when you consider whether actually a suit against the state and a recent case of Kenosha, Wisconsin versus Brunos I believe it was in relation

to a municipality, the Supreme Court of the United States said that even though that they can't even seek equity relief against a municipality which is not a proper party under 1983 and also they analogize that in a case against the State so in essence this is a case against the State even though there is no damages sought, under the principles of Kenosha and (T. 91) the other cases the State could not be a party to the action at all and the suit should be dismissed because that case clearly says contrary to what has been thought prior to that case under 1983 against a municipality or a State, and I say State, it doesn't mention it but I think that would be included in that reasoning that you can't give equity relief either.

(Judge Pointer): Can't sue anyway?

(Mr. Jenkins): That's right. You could sue somebody if they were liable and guilty of some wilfull act or something of that nature but I think you would have to sue for damages.

Everybody has talked so much about Younger versus Harris and the principle involved there, I don't think it is necessary or that I could shed too much light on it except to say we think they do apply in my case particularly. And the Supreme Court – to get to the issues of abstnetion, the Gibson versus Berryhill which I cited I believe would tend to indicate or definitely that the court should abstain even if it found there was some way to get by Younger versus Harris or immunity of a prosecutor in these other (T. 92) cases.

So the argument I presented in the brief concerning this action being quasi criminal action rather than just a purely civil one would be the argument that is shown there in

Younger versus Harris would apply. I think that is clear and we would insist on this – those principles being applied to our action in the State Court which is also a quasi criminal action.

On the question of immunity, may it please the Court, Becker versus Thompson, a Fifth Circuit case, 459 Federal 2nd, 919 held that relief should be denied in free prosecution cases also. It was brought out that they might not consider cases where there wasn't a Federal prosecution pending but I don't think – they have admitted that there is an action pending in the State Court. Of course, all along they wanted the Federal forum rather than the State forum in this action and in bringing the action I think the first tried to remove it and it was remanded and they did that immediately upon filing the complaint in the State Court and then they voided the hearing, on the initial hearing and then turned around and (T. 93) found out it had been remanded and filed this action, present action in this court. Then a hearing was had and they issued a temporary injunction and didn't appeal from it and there is an appeal available. They, of course, by-passed that now and they are subject to a final hearing and possibly a permanent injunction which they would also have an appeal from. But they have not sought any of these avenues and are merely trying to substitute this court for the State Court.

So the issue involved is whether or not the statute is being applied is the same whether applied to the constitution or the constitution statute would be the same if it was heard in that court and is the same if heard in this court.

(Judge Rives): Does Mr. Morgan want to speak in your case too?

(Mr. Jenkins): Yes, but he has granted me most of the time. So I will have just a few more words.

I want to get passed that and if you get to the merits of the case at issue for obscenity, the United States Supreme Court opinion recently (T. 94) rendered indicates they want the State Court to decide these matters on obscenity. Of course, that is the question involved in this case and in deciding whether or not it is an unconstitutional application of the law I think you would have to consider it.

The many cases have held and Organization for a Better Austin versus Keefe and New York Times versus United States, the Supreme Court said that the government did not meet its burden in showing justification for the imposition of prior restraint of expression. Those are newspaper cases and which I think obscenity is – wasn't even obscenity involved but in deciding the application of the statute they say that it is not every case that comes – cannot be restrained. They say there are some cases where they can be restrained. However, you have to meet the burden by showing the justification for the imposition of prior restraint.

The recent case of the United States versus One Reel of Film in the First Circuit, the judge there said we are told by the Supreme Court that obscene material is unprotected by the First Amendment and (T. 95) material being described as confined to work which particularly describes sexual conduct, we can only read the recent cases as an expressed rejection of any argument that pornography, because of its liberating impact has, for that reason alone serious artistic or scientific value. We would be misreading the message unmistakably transmitted by the Supreme Court were we to hold otherwise.

So we have shown that we have had criminal convictions in our case involving obscenity and the U.S. Supreme Court has said that is not protected and we think that the other cases allowing the prior restraint when shown is justified would be allowed in this case if the ordinance or statute itself is deemed constitutional. So it gets past the State jurisdiction of it and we think we ought to be dismissed on the merits alone.

Thank you.

(Mr. Garrett): Your Honors, I hope this Honorable Court will not construe the brevity of my remarks to be a reflection on the merits f the State's case and the motion to dismiss. I will address myself solely to the cases of Younger versus Harris (T. 96) and Samuels versus Mackell and the Younger and Samuels cases principles in those cases provide the Federal Court may not enjoin a pending State criminal proceedings in the absence of special circumstances suggesting bad faith, harrassment or irreparable injury that is both serious and immediate.

The Supreme Court has recently reiterated the principles of Younger and Samuels cases were under ordinary circumstances permit either declaratory judgment or injunction with respect to validity or enforcement of the State statute when a criminal proceeding under the statute has been commenced. This is Gibson versus Berryhill. The Gibson case further states that Younger contemplates the outright dismissal of the Federal suit and the presentation of all claims, both State and Federal, to the State Courts. Such a course naturally presupposes the opportunity to raise and have timely decided by a competent State tribunal the Federal issues involved.

The defendant, Earl Morgan, submits to this court that plaintiffs have failed in their complaint to show those special circumstances suggesting (T. 97) that Mr. Morgan show bad faith, harrassment, or an irreparable injury that is both serious and immediate. In the instances of conduct attributed to Mr. Morgan we submit tha the court is asked to infer from the naked fact of a single suit, a contrived and imputedly malicious decision to deprive plaintiffs of certain constitutional rights apparently believed by the plaintiffs to be absolute under all circumstances and conditions. The plaintiffs' requested relief contravenes even the possibility of the integrity of all independant judicial systems in the State of Alabama and the plaintiff would seek to enjoin for all time any adjudication by that judicial system seeking extraordinary relief on the basis of allogations therefrom because the plaintiffs apparently prefer the Federal and not the State judicial forum for this particular case.

Thank you.

(Mr. Graves): If Your Honor please, in rebuttal, first, Mr. Johnston made the statement about admitted pornographers in the State Court. In the pre-trial order which was entered the very first part of the stipulation of respondants was the (T. 98) respondants contend, one, that the film shown were not lewd. So there was a denial any of these films were lewd.

The second thing is that the court then interpreted lewdness, assignation or prostituion, it says lewdness is obscenity and Mr. Johnston or Mr. Manning said this is a word of art but I submit to Your Honors, when the Federal Court was construing all the custom statutes, 1305 and the various matters that have come up where the use of the words

lewd, lacivious, obscene, etc. in it, they have disregarded all those phrases and said we just consider just the word obscene to make the statute constitutional and obscene we construe to mean and then they give the Roth test which is now been changed to the Miller test.

Thirdly, so far as the court interfering with State relations here, one thing that I forgot and should have mentioned is that in the Wisconsin case has to do with the drunk statute and putting a drunk in jail an; the Arkansas – I mean the Alaska Fish cases, in both of those cases the Supreme Court said we don't have to wait for any State construction of it because it is so clear it is a violation of (T. 99) Federal rights.

As to the advocation of ideas, we go back to the Board of Regents case in New York, the Supreme Court case which throughout the New York Censorship Statute where they said advocating adultery is against the morals and certainly we say that this attitude as to what is obscene in this and taking that position that these materials are presumptively protected by the First Amendment and the theatre contends that they were and the films that they would show in the future will conform and that as I cited in the case in the brief that I did not quote from, the Oregon Book Mart case, 321 Federal Supplement which had to do with licensing inspection, the court said it is immaterial whether the books examined by the City Council were obscene and assume that they were but the ordinance was unconstitutional and it is the type of censorship which depended on the discretion of the council of censors. They denied a business license. Here they are claiming both in personam as Mr. Manning said, that you can't show any motion pictures which we can then cite you for contempt or to show cause why you are not in contempt

and also that you can't (T. 100) operate the theatre but you can go and spend all the money necessary to put in – you can't take personal property but you can go rent you another theatre or build you another theatre with projection equipment, seats and personal property of all other matter and then take a chance of whether we cite you for contempt to show anything like that.

(Mr. Smith): May it please the Court, counsel opposing the position that Mr. Graves and I have presented here today have talked about the fact that the Supreme Court has said that pornography is no longer protected by the law and would have this court believe that really there is no Civil Rights question left because there is no constitutional question left. Well, also they are going to talk about Near versus Minnesota and that was long before any question involving the obscenity issue and certainly that wouldn't be applicable.

I point out to the court that the case of Heller versus the State of New York, that case in the United States Supreme Court said the movie clearly would be obscene under any kind of a test. However, it made no difference whether obscene or (T. 101) not until such time as it has been adjudicated obscene, it was presumptively protected and what do we read on Page 5069 of 41 Law Week? The courts will scrutinize large scale seizures of books, films or other material presumptively protected under the First Amendment to see that certain requirements of Quantity Books and Market are fully met and then it says see Near versus Minnesota. In the context of an obscenity case, see Near versus Minnesota. So it is applicable. Throughout the whole thing they say that you can only seize one film. You cannot stop the exhibition of a

film until it has been determined to be obscene and only then they go on to say that seizing a film or destroying it or blocking its distribution or exhibition is a very different matter.

So the court is saying it is alive, it is vital, this concept and, why, becuase taking Quantity Books versus Kansas or any of these cases, whether it is New York Times or Bantom Books or any of these cases, the danger of chilling speech that could result from self-censorship, it is the protection that is afforded the public, not the pornographers as counsel (T. 102) would so call it but it is the public's right to access. What do they say in Quantity Books versus Kansas? That the proceedings took too long and that the public was deprived of the access of the books which had not first been adjudicated as being obscene. The Supreme Court said in Heller that it is different when you are taking one thousand criminal proceedings and in Quantity Book Stores versus Kansas it states the markets are still alive when you are dealing with large scale numbers and this is a large scale number certainly when every book in the store no longer can be offered for sale as it stands. So I wanted to make that point.

Mr. Jenkins would say we don't have the right parties and he says that the State can't be named. What does Congress say about 2281? Why is there even a 2281 if a State can't be named when a constitutional question is presented as to State law, then how do we ever get the issue resolved. 2284 takes care of that. You serve a copy on the Governor, a copy on the Attorney General of the State to be sure that there is adequate representation brought in there where the issues can be resolved.

(T. 103) We say, Your Honors, counsel would say that the New York Times newspapers cases and stuff like that, they were newspapers, they didn't deal with obscenity or pornography. We take the case of Carroll versus President and Commissioners of Princess Anne County. That dealt with black races, wanting to go out and talk about the blacks. But the Supreme Court in that case, the majority opinion said that you cannot stop a speech before it occurs. Your remedy is to punish it after it occurs if it is an abuse of speech. And they cite in support of that position Quantity Books versus Kansas and Marcus versus Search Warrant. They cited cases that allegedly related to obscenity.

Now, the last point I want to make is if we wanted to have Judge Barber set aside his order we would theoretically, according to counsel, be able to come in and say well, Judge, we are not going to sell any more pornographic pictures or obscene pictures. Well, how do we define what is obscene. Well, theoretically Judge Barber might consider fornication obscene as Mr. Manning does. Well, fornication is not obscenity. It is not (T. 104) synonomous with obscenity. Certainly Kingsley versus New York Board of Regents points that out. That is the delima we find ourselves in. We made an election in Federal Court to assert our Federal constitutional question and we would ask for the relief prayed for be granted.

Thank you, Your Honors.

(Judge Rives): Gentlemen, we thank you for your argument and the Court will take the cases under consideration.

Court will stand in recess.

(At 12:35 P.M. court was adjourned.)

(T. 105)

CERTIFICATE

STATE OF ALABAMA)
JEFFERSON COUNTY)

I hereby certify that the foregoing pages contain a full, true and correct transcript of the proceedings had in the above style cause.

OFFICIAL COURT REPORTER

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

GENERAL CORPORATION, FIRST AMENDMENT FOUNDATION, INC., and CINEMA THEATRE OF HUNTSVILLE, INC.,
Plaintiffs
v.
EUGENE SWEETON, CHARLES H. YOUNGER, JOHN D. SNODGRASS, and CITY OF HUNTSVILLE,
Defendants

MTM, INC., an Alabama corporation; and MOBILE BOOKMART, INC., an Alabama corporation,
Plaintiffs
Civil Action No. 73-194-NE
v.
WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama: EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Defendants
Civil Action No. 73-427-S

Before RIVES, Circuit Judge, and McFADDEN and POINTER, District Judges.

POINTER, District Judge:

Positing jurisdiction under 28 U.S.C. §§ 1343 (3) and 2201, plaintiffs filed these actions under 42 U.S.C. § 1983, seeking injunctive and declaratory relief from state court orders, entered pursuant to Alabama nuisance statutes, Alabama Code, Title 7, §§ 1091-1108[1], enjoining the operation of several theatres and book stores. These two cases were consolidated pursuant to Rule 42, F.R.C.P. A three-judge court was constituted to hear the consolidated cases, which are now submitted for decision on the merits and on motions to dismiss.

At the outset this Court must determine the propriety of federal intervention in state court proceedings in these cases. Principles of equity, comity and federalism dictate that state court proceedings remain free from federal court intervention, except in cases where plaintiff can show the existence of "special equities" that justify intervention.[2] *Younger v. Harris*,

[1] These statutes were designed to deal with places of "lewdness, assignation, or prostitution." Defendants herein have used these statutes to deal with places where obscene material is allegedly shown or distributed.

[2] We decline to await the Supreme Court's decision on the appeal from *Pursue Ltd. v. Huffman*, _____F.2d_____ (W.D. Ohio 1973, C72-432, Apr. 1973). The *Younger* problem was not dealt with by the District Court in that case, presumably due to the lack of identicality of parties in the state and federal cases. Nor do we consider the Supreme Court's summary remands on June 25, 1973, of a number of cases, including *Grove Press, v. Bailey*, 318 F.Supp. 244 (N.D. Ala. 1970) and *Spivak v. Shriver*, 315 F.Supp. 695 (M.D. Tenn. 1970), for "further consideration in light of *Miller v. California* _____U.S._____ (1973)" etc., without mentioning *Younger* as overruling *Younger*.

401 U.S. 37 *(1971); Perez v. Ledesma,* 402 U.S. 82 (1971). The *Younger* case and its progeny can be considered as merely restating traditional principles applicable to both civil and criminal cases. 401 U.S. at 43-45; *Lynch v. Snepp,* 472 F.2d 769 (C.A.4, 1973). The Fifth Circuit has not yet been squarely faced with the question of whether or not *Younger applies to purely civil proceedings; however, it has found Younger* applicable to matters which, though labelled civil, have significant implications for a state's enforcement of its criminal laws. *Duke v. Texas,* No. 71-2845 (C.A.5, April 20, 1973); *Palato v. McAuliffe,* 466 F.2d 1230 (C.A.5, 1972). See *American Radio Ass'n v. Mobile Steamship Ass'n,*_____F.2d_____ (C.A.5, No. 72-3803; August 22, 1973). *Cf. Hobbs v. Thompson,* 448 F.2d 456 (C.A.5, 1971). Other circuits have indicated that *Younger* does apply to civil matters. *Cousins v. Wigoda,* 463 F.2d 603 (C.A.7, 1972), *application for stay denied* 409 U.S. 1201 (Rehnquist, Circuit Justice); *Lynch v. Snepp, supra.* We need not now reach this question, since we conclude that the state proceedings here in question complement, or serve as a substitute for, the criminal laws of the state.[3]

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[3]Compare the situation in 80 *Drive-in v. Baxley,* 468 F.2d 611 (C.A.5, 1972), wherein the Fifth Circuit had before it a matter which it indicated was purely civil in nature. That matter involved Alabama's general nuisance statutes, Alabama Code, Title 7, Article 1 of Chapter 31, whereas we are now faced with an application of Article 2 of Chapter 31, dealing with places of lewdness, assignation and prostitution as public nuisances. Note that § 1107 of Article 2 requires certain state officials to institute nuisance proceedings where nuisance has been established in a criminal proceeding, a criminal verdict of guilty being conclusive in the civil action. *See also, Ridge v. State,* 206 Ala. 349, 89 So. 742 (1921).

What then does *Younger require? As stated by the* Supreme Court in the more recent case of *Mitchum v. Foster,* 407 U.S. 225, 230 (1972):

> In *Younger,* this Court emphatically reaffirmed "the fundamental policy against federal interference with state criminal prosecutions." 401 U.S., at 46. It made clear that even "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enfore it." 401 U.S., at 54. At the same time, however, the Court clearly left room for federal injunctive intervention in a pending state court prosecution in certain exceptional circumstances – where irreparable injury is "both great and immediate," 401 U.S., at 46, where the state law is "flagrantly and patently violative of express constitutional prohibitions," 401 U.S., at 53, or where there is a showing of "bad faith, harrassment, or . . . other unusual circumstances that would call for equitable relief." 401 U.S., at 54.

In the present cases the plaintiffs have failed to demonstrate that the state court actions have been instituted in bad faith or to harrass. Compare *Cameron v. Johnston,* 390 U.S. 611 (1968) with *Dombrowski v. Pfister,* 380 U.S. 479 (1965). Plaintiffs are not being threatened with mutiple prosecutions – indeed, the essence of their complaint here is that they are not. *Cf. Younger v. Harris,* 401 U.S. at 47 ("the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution").

There is a insufficient showing that plaintiffs will suffer irreparable injury if consigned to their state court remedies. In Alabama permanent injunctions are appealable, and temporary injunctions may be made appealable by appropriate motions,

and both types of appeals are given expedited, preferential treatment by statute.[4]

There is a question as to whether the Alabama nuisance statutes here in question are "flagrantly and patently violative of express constitutional prohibitions." *Mitchum v. Foster, supra.* However, it is quite possible that the Alabama Supreme Court might construe these statutes as inapplicable to motion picture threatres and book stores, obviating any federal constitutional question.[5] If a constitutional question remains

[4] See Alabama Code, Title 7, §§ 757, 1057 (Recomp. 1958). The plaintiffs in the federal court cases have had, have, or can have viable appellate rights (though it appears that at least two of the plaintiffs have elected to let the time for appeal expire).

[5] Note that the Georgia statute involved in *Speight v. Slaton*, 356 F.Supp. 1101 (N.D.Ga. 1973), on appeal to the Supreme Court as #72-1557, is specifically directed at obscenity and, unlike the Alabama statute, calls for destruction of the materials, even those which would be held not obscene. In *Speight* the state admitted that not all the materials sought to be seized were legally obscene; in the present case the posture of governmental officials apparently is that each and every film or book is legally obscene. Moreover, in *Speight* there was apparently "no way to construe abatement of a public nuisance to avoid the [claimed] constitutional infirmity" and the Georgia Supreme Court "may have already approved of the use of the public nuisance approach to closing down activities involving 'obscene' materials." (Judge Morgan dissenting in *Speight*, 356 F.Supp. at 1107, 1108.) We have not been advised of any like approval by the Alabama Supreme Court. Due to the differences in the cases it is doubtful that a reversal by the Supreme Court in *Speight* would be controlling on the cases here.

after the statutes have been authoritatively construed, such question can be decided by the Alabama Supreme Court upon the same appeal.

On balance, we conclude that the plaintiffs have failed to show any of the exceptional circumstances required by *Younger* and that accordingly it is the duty of this Court to dismiss these cases.[6] Dismissal is, of course, without prejudice to any rights plaintiffs may have in the Alabama courts; and we intimate no opinion as to the merits of these cases.

For the foregoing reasons, it is ORDERED, ADJUDGED and DECREED that the above-styled cases be, and the same hereby are, dismissed, each party to bear his own costs.

DONE, this the 18th day of October, 1973.

/s/Richard T. Riva
United States Circuit Judge

/s/Sam C. Pointer, Jr.
United State District Judge

/s/Frank McFadden
United States District Judge

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[6] We note our conclusion that these cases require the action of a three-judge court, 28 U.S.C. §§ 2281, 2284, even where the only action taken is dismissal for reasons of guilty, comity and federalsim.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MTM, INC., an Alabama Corporation;
and MOBILE BOOKMART, INC.,
an Alabama Corporation,
Plaintiffs

v.

WILLIAM J. BAXLEY, in his capacity
as Attorney General For the State
of Alabama; EARL C. MORGAN, in his
capacity as Prosecuting Attorney for
the Tenth Judicial Circuit of the
State of Alabama; and HERBERT JENKINS,
JR., in his capacity as Assistant City
Attorney for Birmingham, Alabama,
Defendants

Civil Action No. 73-427-S

NOTICE OF APPEAL

Now come the Plaintiffs, MTM, Inc., an Alabama Corporation, and Mobile Bookmart, Inc., an Alabama Corporation, in the above-styled cause, and gives notice of appeal from the judgment and order of the Honorable Richard T. Rives, District Judge, the Honorable Frank H. McFadden, District Judge, and the Honorable Sam C. Pointer, Jr., District Judge, rendered the 18th day of October, 1973, to the United States Supreme Court.

ROBERT EUGENE SMITH and
FERRIS S. RITCHEY, JR.

By: /s/Ferris S. Ritchey, Jr.
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73-119

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

vs.

WILLIAM J. BAXLEY, in His Capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in His Capacity as Prosecuting Attorney for the Tenth Judicial Circuit of Alabama; and HERBERT JENKINS, JR., in His Capacity as Assistant City Attorney for the City of Birmingham, Alabama,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division

MOTION TO DISMISS APPEAL OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

vs.

WILLIAM J. BAXLEY, in His Capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in His Capacity as Prosecuting Attorney for the Tenth Judicial Circuit of Alabama; and HERBERT JENKINS, JR., in His Capacity as Assistant City Attorney for the City of Birmingham, Alabama,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division

MOTION TO DISMISS APPEAL OR AFFIRM

QUESTIONS PRESENTED

I

Whether or not this appeal should be dismissed because it was not timely filed in compliance with Rule 13 of the Revised Rules of the Supreme Court.

II

Whether or not the principles of the series of cases headed by **Younger v. Harris,** 401 U.S. 376 (1971), are applicable to a pending state court proceeding to abate a nuisance which proceeding is pursuant to state statutes in aid of state criminal laws.

STATEMENT OF FACTS

The appellee, Herbert Jenkins, Jr., as Assistant City Attorney for the City of Birmingham, filed on behalf of the State of Alabama, a suit dated March 7, 1973, in the Circuit Court for the Tenth Judicial Circuit of Alabama—In Equity—Case Number 177-199, against appellants, MTM, Inc.; Chester McKinney; Thomas McGary and fictitious parties, under the Alabama Nuisance Law, Title 7, Sections 1091-1108, Code of Alabama 1940 (Recompiled 1958), to abate the maintenance of a nuisance at the Pussycat Adult Theatre at 7610 First Avenue North in the City of Birmingham, Alabama, which was for the continued and repeated violations of the City of Birmingham Obscenity Ordinance Number 67-2, and based upon numerous convictions for violation of said ordinance by the appellants which said convictions cumulated to a noxious public nuisance.

A temporary injunction closing the nuisance was granted by the State Court against appellants on May 24, 1973, after a hearing, and in the meantime the appellants filed the present suit in the U. S. District Court for the Northern District of Alabama seeking to enjoin the enforcement of the temporary injunction and a declaratory judgment that the State statute under which the temporary injunction was obtained is unconstitutional as written and or as applied. No appeal was taken in the State Court proceedings as to the issuance of the temporary injunction although an appeal was available in the

State Courts. No final hearing upon the issue of whether the injunction should be made permanent was had at the request of appellants or with their approval pending the outcome of the federal suit.

After a hearing in the U. S. District Court before a three-judge panel, a judgment was entered on October 18, 1973, denying the relief sought based upon the principles of equity, comity, and federalism announced in the case of **Younger v. Harris,** 401 U. S. 376 (1971).

A Notice of Appeal to the Supreme Court of the United States was filed by appellants on the 9th day of November, 1973.

On January 21, 1974, this appellee received appellants' Statement of Jurisdiction which was filed on January 16, 1974, in the Supreme Court.

I

MOTION TO DISMISS

Pursuant to paragraph 1(a) of Rule 16 of the Revised Rules of this Court, the appellee, Herbert Jenkins, Jr., in his capacity as Assistant City Attorney for the City of Birmingham, Alabama, moves this Honorable Court that the appeal be dismissed for that the appeal was not taken in conformity to the rules of this Honorable Court.

On the 18th day of October, 1973, a judgment was entered in the United States District Court for the Northern District of Alabama—Southern Division—by a three-judge panel in Civil Action Number 73-427-S. A Notice of Appeal was filed on the 9th day of November, 1973, to the Supreme Court of the United States. Rule 13 of the Revised Rules of the Supreme

Court required the appellants to docket the case accompanied by the Statement of Jurisdiction within sixty days from the filing of the Notice of Appeal. This is an appeal pursuant to Section 1253 of Title 28 of the United States Code as is stated by appellants in the Statement of Jurisdiction filed in this court on January 16, 1974. Therefore, this case was not docketed within sixty days which expired on December 17, 1973, but was on the nintieth day from the filing of the Notice of Appeal. This appellee has not received notice of the date of docketing in accordance with Rule 13(3), but was advised by a member of the Clerk's Office of this Court that the case was docketed on January 16, 1974, and given the number appearing in the style of this appeal.

Appellee has not received a notice of an extension of time for such docketing, and therefore the appeal was not docketed within the sixty days allowed from the filing of the Notice of Appeal and is not timely.

For the foregoing reason, the appellee respectfully moves that this appeal be dismissed.

II

MOTION TO AFFIRM

In the alternative, the appellee moves this Honorable Court to affirm the judgment of the U. S. District Court for the Northern District of Alabama—Southern Division—pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States on the ground that the appeal fails to present any substantial federal question and further that this case is not one for appeal and does not require further argument.

The issue involved here then has been answered both in **Younger v. Harris,** 401 U.S. 37, and in **Mitchum v. Foster,** 407 U.S. 225. This Honorable Court made it clear in these two

cases that federal intervention in state court proceedings which are pending is not permitted in the absence of certain exceptional circumstances.

The appellants seem to believe that the judgment of the District Court was wrong because of its determination that the proceeding in question was in the nature of a criminal action. Although they admit the numerous convictions for violation of the City obscenity laws, it is insisted that the State Nuisance Statute permits only a civil action and not a criminal one, and that therefore the principles of **Younger v. Harris,** supra, do not apply. The action in the state court sought to be enjoined is still pending. It was an action taken in aid of the criminal laws of this state and its subdivisions. In **Gibson v. Berryhill,** 411 U.S. 564, this court indicates that the principles of **Younger v. Harris** are applicable to at least quasi-criminal cases pending in state courts and that if a state court has held an action is quasi-criminal in nature then the federal court will so consider it and apply **Younger** principles. The Alabama Supreme Court has held that an action under the statutes here involved may be deemed a quasi-criminal action. **Ridge v. State,** 206 Ala. 349, 89 So. 742. Obviously, this appeal presents an unsubstantial question and does not deserve this court's attention nor does it need further argument.

Furthermore, the principle of **Kenosha v. Bruno,** — U.S. —, 93 S. Ct. 2222, — L. Ed. 3rd —, that a civil rights action for declaratory and injunctive relief against municipalities will not be entertained in federal court is also applicable to actions against the state even though such a suit only names prosecuting officials in their official capacities and fails to allege that such parties acted outside their official capacities. In such cases, the relief sought is actually against the government and should not be allowed. **Larson v. Domestic & Foreign Commerce Corp.,** 337 U.S. 682 (1949). This principle is aside from that of Prosecuting Officials' judicial immunity in such cases. **Pierson v. Ray,** 386 U.S. 547.

CONCLUSION

For the reasons stated, it is respectfully moved that the Motion to Dismiss or Affirm be granted.

Respectfully submitted

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Supreme Court, U. S.
FILED
SEP 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

BRIEF OF APPELLANTS

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The District Court Improperly Denied Appellants' Request for Injunctive and Declaratory Relief and Improperly Applied the Requirements of *Younger v. Harris*, 401 U.S. 37, As No Criminal Proceeding Was Pending in the State Courts, and As Appellants Were and Are Subject to Irreparable Injury. 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

BRIEF OF APPELLANTS

OPINION BELOW

The opinion of the District Court for the Northern District of Alabama, Southern Division, is not yet reported. A

copy of the Opinion and Order of the three-judge court by District Judge Pointer is printed as Appendix B.

JURISDICTION

This suit was brought pursuant to *28 U.S.C. § 1343(3) and 2201*, based on a cause of action under *42 U.S.C. § 1983*. A three-judge court was requested to be convened pursuant to *28 U.S.C. §§ 2281 and 2284* to enjoin the use by Appellees of certain Alabama statues as unconstitutional. The Opinion and Order of the three-judge district court was entered on October 18, 1973. The Notice of Appeal is is printed as Appendix E. The jurisdiction of the Supreme Court to review the decision of the district court by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

Whether the *Younger v. Harris*, 401 U.S. 37 (1971) and *Samuels v. Mackell*, 401 U.S. 66 (1971) requirements for injunctive and declaratory relief were correctly applied where no criminal proceeding was pending in the state court to close the premises.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Alabama Nuisance Statutes, Alabama Code, Title 7, Sections 1091-1108 and Alabama's Obscenity Statute, Title 14, Sec. 374. The pertinent provisions thereof, along with the pertinent provisions of the *First, Fifth, and Fourteenth Amendments to the Constitution of the United States* are attached to the jurisdictional statement as Appendix C.

STATEMENT OF THE CASE

One of the appellants, Herbert Jenkins, Jr., on the behalf of the State of Alabama, filed a suit dated March 7, 1973, In Equity, being case No. 177-199, against MTM, Inc., Chester McKinney, Thomas McGary and fictitious parties, seeking to permanently enjoin the maintenance of a nuisance at the Pussycat Adult Theater of 7610 – 1st Avenue North in the City of Birmingham under Title 7, Sec. 1091 et seq., Code of Alabama 1940 (Recompiled 1958). The nuisance alleged consisted of repetitive acts which purportedly cumulated to a nuisance. The alleged repetitive acts were numerous convictions (none of which is final) for violation of the obscenity laws of the City of Birmingham for showing obscene movies and selling obscene matter at said premises. The action was instituted pursuant to the State statute specifically Sec. 1107 of Title 7. (See Appendix C, Jurisdictional Statement.

A hearing in State Court was held on May 24, 1973 on the Plaintiff's Application for a Temporary Injunction and Issuance of a Restraining Order; an order was issued granting a Temporary Injunction Closing the Pussycat Adult Theatre, (see Appendix A). The present action was filed on May 3, 1973, seeking to have the Federal Court enjoin the enforcement of the Temporary Injunction issued by the State Court judge and to have the State statute under which it was granted declared unconstitutional as written and/or as applied.

The requisite three-judge court was requested pursuant to *28 U.S.C. §§ 2281 and 2284*. The Appellees sought to utilize an *Alabama statute, Title 7, Section 1107* which declared that the use of any premises in violation of any of the provisions of the *Criminal Code of Alabama* shall constitute a public nuisance.

The statutory provisions of *Alabama Code, Title 7, Sections 1091-1108* inclusively, were attacked by Appellants as being unconstitutional on vagueness and overbreadth grounds as well as being violative of their due process and, further, because they do not warrant a nuisance action either by manner of dissemination or unwarranted intrusions into the public's privacy. *Rabe v. State of Washington*, 405 U.S. 313 (1972); *80 Drive-In v. Baxley*, 478 F.2d 611 (1972) (drive-in theatre viewable to the public from the main road).

Title 7, Sections 1091-1108 were challenged as being unconstitutional as written and as applied because they authorize a prior restraint on materials which are presumptively protected under the *First Amendment* of a kind condemned by the Supreme Court in an unbroken line of cases beginning with *Near v. Minnesota*, 283 U.S. 697 (1931) and continuing through *New York Times Co. v. United States*, 403 U.S. 713 (1971) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) and others. The statutes were also attacked as denying due process and equal protection in that the statutes make a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance. This labelling of a business as a public nuisance on the basis of a single isolated transaction was also attacked as creating an invalid presumption of the type condemned by the United States Supreme Court in *Leary v. United States*, 395 U.S. 1532. It was further attacked as denying *Fifth* and *Fourteenth Amendment* rights

to have every element making up a nuisance to be proven by competent evidence, in a *First Amendment* context, beyond a reasonable doubt.

The Appellant operated a book store and retail store combination in the City of Birmingham on property appropriately zoned. These public organizations were engaged in the sale and/or exhibition of books, magazines, newspapers, motion picture films and other materials which are presumptively protected by the *First Amendment* to the *Constitution* of the *United States*.

The publications offered for sale and/or exhibition by the Appellant are comparable to those declared not to be obscene by the Supreme Court and many inferior Federal Courts, as well as state appellate courts, and hence, are protected expression under the *First Amendment* to the *United States Constitution*. No sales or offerings are made to persons under eighteen years of age (minor) of any of the adult-type publications or movies distributed or exhibited by the Appellant, nor are they "pandered" in the Ginzburg-sense, nor are the materials sold in such a way that unwilling persons cannot avoid them.

Separate convictions have been obtained for obscenity against employees of the Appellants for distributing or exhibiting obscene material upon the premises owned by the Appellants. All convictions are on appeal and no judgment is final as of this writing. The three-judge panel dismissed the action and refused to grant injunctive relief on the basis of *Younger v. Harris*, 401 U.S. 37 (1971). The Court held that the propriety of federal intervention in the circumstances presented had been decided by the Fifth Circuit Court of

Appeals in *Palais v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972) and therefore, since the state court action was not brought in bad faith[1] or for purposes of harassment and Appellants did not present any "special circumstances which would justify federal intervention," the complaint must be dismissed. The Court dismissed the complaint and did not abstain, thereby retaining jurisdiction. The effect of the words of the decision

[1]The Defendants and/or their agents, servants and employees have established a pattern of conduct under color of enforcement of state law, customs and city ordinances within the City of Birmingham, Alabama of harassment and bad-faith prosecutions, under facially invalid statutes and ordinances, attempting the ultimate suppression of presumptively protected publications, motion pictures and materials without, to this date, ever having had any final judicial determination that any of said publications, motion pictures or materials are, in fact, obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees will continue to engage in the acts of utilizing nuisance laws, as well as other unconstitutional enactments and conduct that has had the effect of perpetuating a "chilling effect" upon the exercise of Plaintiffs' *First Amendment* rights, as well as the right of interested adult citizens of the City of Birmingham and the State of Alabama, and of the other forty-nine states who may visit Alabama and who wish to exercise their *First Amendment* right to buy, review and view non-obscene publications and films. The frantic efforts on the part of Defendants to close Plaintiffs' businesses and the threatened closure under the guise of the abatement of a nuisance constitute attempts at a constitutionally invalid "prior restraint" which is condemned by the *First, Fifth and Fourteenth Amendments* to the *Constitution of the United States* and which might be apropos in a police state, but is anathema to a free society such as our.

was founded on abstention. However, the act of the three-judge panel in dismissing the case without retaining jurisdiction appears to be an adjudication on the merits.

In that the majority of the three-judge court finding that *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases[2] as interpreted by the Fifth Circuit in *Palaio v. McAuliffe, supra*, required non-intervention, the action was dismissed and this appeal follows.

This Court for more than forty years has instructed the judiciary both state and federal that it is not possible to safeguard the precious *First Amendment* rights by permitting injunctive restraints upon the free exercise thereof utilizing overbroad statutes including nuisance statutes, *Near v. Minnesota*, 283 U.S. 697 (1931) as well as enjoining future dissemination. As so aptly put by Mr. Chief Justice Hughes, *283 U.S. 697* at 713, "This is the essence of censorship."

There are extensive parallels in *Near* and the case presently before the Court. Both were subject of a civil nuisance statute enforceable by injunction and contempt proceedings permitting prior suppression of future dissemination. Also both were subjected to preliminary injunctive sanctions.

With this clear mandate, followed from that time forward in multiple decisions, we find a state Court operating under a strikingly similar statute invoking the remedies found to be so abhorrent in *Near*.

[2]*Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 79 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

The Complaint filed in the within proceedings demonstrates to the Court the potential of irreparable injury necessary to invoke the jurisdiction of the federal forum to litigate federal constitutional rights. However, the majority of the statutory three-judge court found that the principles of *Younger v. Harris*, supra and *Samuels v. Mackell*, supra, mitigated against that court in going beyond the question of jurisdiction to decide the substative legal issues involved.

Younger v. Harris seems to say that in criminal cases no injunctive relief can be granted by a federal court interfering in a State criminal proceeding unless there are circumstances present which dictate irreparable injury to the parties or circumstances which indicate bad faith enforcement of the law and/or harassment by State authorities.

The court did not reach the question in *Younger* as to whether the same rationale would apply to State court civil proceedings instituted prior to the attempt by a party to invoke jurisdiction of the federal forum, or under what circumstances the federal forum may intervene to enjoin State court civil proceedings and whether those proceedings are governed by the same requirements of *Younger v. Harris*.

This case presents the potential for this Court to enter into a resolution of those questions and problems.

ARGUMENT

THE DISTRICT COURT IMPROPERLY DENIED APPELLANTS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF AND IMPROPERLY APPLIED THE REQUIREMENTS OF *YOUNGER V. HARRIS*, 401 U.S. 37, AS NO CRIMINAL PROCEEDING WAS PENDING IN THE STATE COURTS, AND AS APPELLANTS WERE AND ARE SUBJECT TO IRREPARABLE INJURY.

The question presented herein is virtually identical with that presented in *Speight, et al v. Slaton, et al*, No. 72-1557, Probable Jurisdiction Noted October 16, 1973, argued January 7 and 8, 1973.

The Court is now also considering the following question in *Steffel v. Thompson*, No. 72-5581:

> "Did the Court below correctly apply the *Younger v. Harris*, 401 U.S. 37 (1971) and *Samuels v. Mackell*, 401 U.S. 66 (1971) standards to deny petition *declaratory relief* in a situation which did not involve a pending State criminal prosecution?"

This case was argued before the Court on November 13, 1973 and according to published reports the questioning of the Court related to whether or not the principles of *Samuels v. Mackell*, 401 U.S. 66 (1971) bar declaratory judgment intervention when no prosecution is pending and the attack is on a statute "as applied." Mr. Justice White also raised the question that if that were so, would there not also be a case or controversy problem which may bar declaratory relief.

The question presented in the case at bar relates to whether or not the *Younger v. Harris*, supra and *Samuels v. Mackell*, supra requirement apply to deny petitioners *injunctive and declaratory relief* in a situation which did not involve a pending State criminal prosecution.

It may well be that the decision of this Court in the Steffel case or the Speight case may not adequately answer

the question posed by counsel. Unlike Speight, the State Court has closed the premises occupied by one of the Appellants and the same has been remained closed by Order of the State Court since March of 1973, almost one full year.

This case raises important issues regarding whether a showing of irreparable injury or other extraordinary circumstances is required in order for a federal court to grant injunctive and declaratory relief in cases which involve a pending state civil proceeding but do not pose a threat to state criminal prosecutions. This question was not expressly decided by *Younger v. Harris, supra,* which itself dealt with a criminal case. Mr. Justice Black wrote,

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. 41.

The concurring opinion of Mr. Justice Stewart in *Younger v. Harris,* 401 U.S. at 55, in which Mr. Justice Harlan joined, makes clear the limited nature of the holding in that case:

> "... [s]ince all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently."

However, the majority of the three-judge court in the case at bar, while recognizing explicitly the fact that *Younger v. Harris,* supra, and its companion cases did not decide the issue, felt bound by *Palaio v. McAuliffe,* 466 F.2d 1230 (5th Cir. 1972) and the following language therein:

> "We believe, however, that application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal', but rather should be governed by analysis of the competing interests that each case presents (and) when federal anticipatory relief will significantly affect a state's enforcement—by whatever means—of its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes."

> "We thus pose a limited answer to the question expressly reserved in *Younger, supra,* by holding that, *where plaintiff is unable to prove the existence of 'special circumstances,' the principles of Younger bar federal intervention in a state civil proceeding that is an integral part of a state's enforcement of its criminal laws.*" (Emphasis supplied.)

1. *Palaio v. McAuliffe, supra,* is incorrect in its reasoning and its holding, and, in any event, is not applicable to the present case. In that case, the Solicitor General of the Criminal Court of Fulton County, Georgia, instituted proceedings in the Fulton County Superior Court to have two named motion pictures declared obscene and subject to seizure. Shortly before the date set for the state court hearing Palaio and others filed complaints in federal district court seeking injunctions against pending and future criminal and civil proceedings against them and a declaration that the procedures employed in the state court suit were constitutionally invalid. On March 17, 1971, after the state judge had found probable cause for declaring one of the motion picture films obscene and after the state criminal prosecution of the appellants in *Palaio v. McAuliffe, supra,* had begun, the federal district judge concluded that the suit

to declare the motion pictures subject to seizure was a good-faith effort by Georgia officials to enforce Georgia criminal laws, and accordingly held that dismissal was dictated by *Younger v. Harris, supra.*

By the time the appeal reached the Circuit Court of Appeals the criminal prosecution was pending and the Fulton Superior Court had been affirmed by the Supreme Court of Georgia on October 7, 1971, in *1024 Peachtree Corp. v. Slaton,* 228 Ga. 102, 184 S.E.2d 144.

The Circuit Court of Appeals agreed with the characterization by the Supreme Court of Georgia of the suit to declare the film subject to seizure as a part of Georgia's program of enforcing its criminal laws. It pointed out that a three-judge federal court has suggested such suits might afford a method of obtaining the constitutionally required adversary hearing prior to the arrest and prosecution of one for the sale of allegedly obscene materials. *Gable v. Jenkins,* N.D. Ga. 1969, 309 F.Supp. 998, aff'd, per curiam, 397 U.S. 592 (1971). This ignores the compulsory self-incrimination aspects of such a proceeding which forces one to furnish a film to the court as the beginning of a prosecution for exhibiting that same film.

The Circuit Court of Appeals also relied upon language by the Supreme Court in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 437 (1957) recognizing that such civil suits "supplement the existing conventional criminal provisions dealing with pornography." However, the quoted portion did not refer to "such civil suits." Instead, it referred to §22-a of the New York Code of Criminal Procedure (L. 1941, C. 925), as amended in 1954 (L. 1954, C. 702). Section 22-a of the

New York Code of Criminal Procedure was upheld because it had procedural safeguards. The Alabama procedure has none.

In a case similar to this one, decided after *Younger v. Harris,* supra, and its companions, this Court ruled that 42 U.S.C. § 1983 is an exception to the Anti-Injunction Statute, 28 U.S.C. § 2283, *Mitchum v. Foster,* 407 U.S. 225 (1972). The dissent of Chief Justice Burger, in which Justices White and Blackman joined, urged the district court on remand to consider

> "whether general notions of equity or principles of federalism similar to those invokes in Younger, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." *Id.* at 244.

Assuming, *arguendo,* that the "civil as basically an enforcement of criminal law" theory of *Palaio, supra,* is correct, that is not the case here. While all the materials proffered by the state into evidence are or have at one time been the baisis of criminal prosecutions against individuals, the disposition of the instant case will not, in the words of *Palaio, supra,* "significantly affect a state's enforcement – by whatever means – of its criminal laws." 466 F.2d 1230 at 1233. The pending criminal prosecutions will remain pending no matter what the disposition of this case. Thus the instant case cannot be characterized as civil enforcement of criminal laws. Appellee's complaint requrested the following:

> "(a) . . . injunctions, both temporary and permanent, against the conduct and operation of the Harem Bookstore . . . by any person; and

> "(b) . . . an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with the advertising, sale and exhibition for sale od said merchandise, to be contraband and to be forfeited and destroyed."

That this is an impermissible prior restraint of constitutionally protected materials is obvious and will be discussed hereinafter. Here, however, its inclusion is to show that what is being sought here is qualitatively and substantively different from what took place in *Palaio, supra,* and *Palaio* is not controlling.

2. The decision of the three-judge district court is in conflict with the decision of this Court on *Lake Carriers Association v. MacMullan,* 406 U.S. 498 (1972) in which it was held that abstention was not required by *Younger v. Harris, supra,* and its progeny in an action for injunctive and declaratory relief against the enforcement of the Water Pollution Control Act of the State of Michigan. The statute provided, *inter alia,* that a violation of its provisions would be punished as a criminal misdemeanor. 406 U.S. at 502. The three-judge court involved there held that the complaint failed to state a justiciable controbersy and that compelling reasons justified federal abstention.

This Court finds a constitutionally relevant justifiable controversy but that abstention was appropriate. However, all but one of the District Court's grounds for abstention were rejected. This Court held that abstention was appropriate because the state court could settle the question of a correct contruction of the new act, and possibly avoid the federal question once federal regulations were promulgated.

To reach that decision this Court was compelled to consider the implications of *Younger v. Harris* and *Samuels v. Mackell.* Mr. Justice Brennan found that the stringent post-prosecution tests are inapplicable to a case in which there was no criminal prosecution which was to be enjoined:

> In *Younger v. Harris,* 401 U.S. 37 (1971), and *Samuels v. Mackell,* 401 U.S. 66 (1971), this Court held that, apart from 'extraordinary circumstances,' a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on consideration of equity practice and comity in our federal system that have little force in the abscene of a pending state proceeding. In that circumstances exercise of federal court jurisdication is appropriate if the conditions for declaratory or injunctive relief are met. See generally *Perez v. Ledesma,* 401 U.S. 82, 93 (1971) (separate opinion)." 406 U.S. 498.

The separate opinion referred to is that of Mr. Justice Brennan himself. Since this Court has held that the stringent *Younger v. Harris* and *Samuels v. Mackell* tests do not apply in a suit prior to or not involving criminal prosecutions then the decision of the District Court in this case conflicts with the decision of the District Court in this case conflicts with *Lake Carriers Assoc. v. MacMullan, supra.*

3. The decision appealed from is in conflict with the principles enunciated by this Court in *Gibson v. Berryhill*, 411 U.S. 564, (1973). In that case, Berryhill and others were licensed optometrists employed by Lee Optical Co. and were not members of the Lalbama Optometric Association because membership therein was limited to optometrists practicing privately. They were charged by the Association with unprofessional conduct within the meaning of the state optometry statute because of their employment with the company. The complaint was filed with the Alabama Board of Optometry (board) all members of which were Association members. Two days thereafter the Board brought its own suit in state court against the optometrists and their employer, Lee Optical, to enjoin the company from practicing optometry. The action before the Board was stayed pending the outcome of the state court action. The charges against the individual defendants were dismissed but the state trial court enjoined Lee Optical from engaging in the practice of optometry. The company appealed. The Board, in the meantime, revived the Association's charges against Berryhill and the other appellees, who sought an injunction in the Federal District Court under the Civil Rights Act claiming that the Board was biased. The District Court enjoined the Board proceedings but thereafter the State's highest court reversed the state trial court and held that the optometry law did not prohibit a licensed optometrist from working for a corporation. Thereafter, the Board appealed to the Supreme Court. This Court held that neither the rule of *Younger v. Harris*, 401 U.S. 37 or principles of comity required the District Courts to dismiss the suit in view of the pending Board proceedings. The reasoning that compelled the conclusion that intervention was proper despite the pending actions is applicable here.

This Court unanimously held that a predicate for a *Younger v. Harris* dismissal is "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." A competent tribunal was not present in *Gibson v. Berryhill* because the State Board of Optometry was incompetent by reason of bias to adjudicate the issues before it.

The remaining predicate for a *Younger v. Harris* dismissal – the opportunity to raise and *have timely decided* the federal issues involved – is not present.

Because of the above facts irreparable harm would be present in letting the state court adjudicate the issues involved in the instant case as surely as it was present in *Gibson v. Berryhill, supra*, in which the tribunal was incompetent because of bias.

4. The decision of the three-judge district court is in conflict with the result of the decision of a three-judge court in the Western Division of the United States District Court for the Northern District of Ohio in *Pursue, Ltd. v. Huffman*, _____F.Supp._____ No. C72-432, decided April 20, 1973. In that case a suit was brought under 42 U.S.C. § 1983 seeking injunctive relief and declaratory judgment against the assertedly unconstitutional provisions of the Ohio nuisance statute, O.R.C. §§3767.01, et seq., as it pertains to the exhibition of obscene movies. Huffman, Prosecutor of Allen County, Ohio, filed a civil complaint seeking a temporary and permanent injunction closing the Cinema I Theatre in Lima, Ohio, on the grounds that obscene movies were being shown therein in violation of applicable statutes. After a hearing on Huffman's motion for a temporary injunction the Court

entered an order closing the theatre for an indefinite period. A complaint was filed in the district court and the district court stayed the state court injunction, but only to the extent that that injunction forbade the showing of films which had not been held to be obscene in a prior adversary hearing.

Thereafter, Huffman applied for a hearing for the purpose of conducting a prior adversary hearing on films not yet reviewed and to consider his application for a permanent injunction against the theatre. The Court ordered the theater closed for one year unless released by order of the Court pursuant to compliance by the owners of the theater with certain statutory requirements.

Pursue, Ltd., as successor in interest of the original leaseholder, filed a complaint in the district court seeking a temporary restraining order and preliminary and permanent injunctive relief against the state court judgment and declaratory judgment respecting the asserted unconstitutionality of the Ohio statute. Without even discussing the issues of abstention or comity the three-judge court asserted jurisdiction and held the Ohio statute to be an impermissible prior restraint on First Amendment rights and therefore unconstitutional. Obviously, as did Circuit Judge Morgan in the instant case, that panel had no difficulty in finding irreparable harm in the closing of the place of business.

The *Pursue, Ltd.* case is not unknown to this Court, in that the following has occurred with respect to said case:

A. On or about May 23, 1973 Petitioners Huffman and Fair filed the following documents in this Court:

(i) Motion for Leave to File Petition for Writ of Mandamus or Prohibition, Petition for Writ of Mandamus or Prohibition, and Brief in Support Thereof; Docket No. 72-1613 Misc.

(ii) Motion to Advance Date Set for Filing of Briefs in Opposition to Petition;

(iii) Application to Honorable Potter Stewart for Stay Order or Writ of Injunction.

B. On June 12, 1973, Petitioners' Application for Stay, No. A-1199, presented to Mr. Justice Stewart, was denied.

C. On June 25, 1973 this Court entered the following order in the instant matter:

> "The application for stay or writ of injunction presented to Mr. Justice Stewart and by him referred to the Court and the motion to advance are denied. The motion of Pursue, Ltd., to participate as a party respondent is granted."

D. On or about July 5, 1973 James J. Clancy, Attorney for Petitioners applied to the Court for an extension of time (No. A-53, Re: *Huffman, et al v. Pursue, LTD*) in which to docket an appeal from the opinion and order of April 20, 1973.

E. On July 9, 1973 Mr. Justice White signed an order extending the time for docketing an appeal to an including August 14, 1973.

F. On or about August 14, 1973 a Jurisdictional Statement was filed in this Court appealing the Opinion and

Order of the statutory three-judge court on April 20, 1973, docketed as *Huffman et al v. Pursue, LTD* No. 73-296 on this Court's calendar which Jurisdictional Statement is for the most part identical in substance to the Petition for Writ of Mandamus or Prohibition.

G. On September 17, 1973 Pursue, LTD, Respondent herein, filed a Motion to Dismiss or Affirm and no action has been taken by the Court in No. 73-296.

H. On or about October 23, 1973, *Pursue, Ltd.* as respondent filed a Response in Opposition to Petition for Writ of Mandamus or Prohibition in case No. 72-1613 Miscellaneous.

I. On or about November 12, 1973 this Court denied the Petition for Writ of Mandamus or Prohibition in No. 72-1613.

5. There is no remedy available to Appellants in the state courts of Alabama. It is also true the decision of the Courts of Alabama have already approved the use of the public nuisance approach to the regulation of "obscene" materials.

6. The substantive issue involved on the merits is of paramount importance and its resolution is necessary by this Court in view of the place occupied by the Free Speech and Press provisions of the First Amendment in a democracy. Moreover, the closing of a bookstore or theater under the guise of abating a public nuisance is a constitutionally impermissible prior restraint and violates the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Appellees, in their Complaint to close the Appellants' store and theater as a public nuisance, made it quite clear that they do not seek merely the cessation of what they view as illegal activity on the premises (i.e., the possession, for sale, of obscene materials), but have asked for temporary and premanent injunctions against the further operation of the Appellants' businesses.

It has been well recognized by this Court that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

> "The *First Amendment* requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line . . . Our insistence that regulations of obscenity serupulously embody the most vigorous procedural safeguards . . .is. . .but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. . .'. *Bantam Books v. Sullicvan*, 372 U.S. 58, 66 (1963)." *Blount v. Rizzi*, 400 U.S. 410, 416, 417 (1971).

See also: *Heller v. New York*, 413 U.S. 483, (1973) and *Roaden v. Kentucky*, 413 U.S. 496, (1973).

Moreover, this Court has made it clear that since

> "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . .[t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Appellees, under their planned use of the nuisance concept, do not plan to separate protected from unprotected speech; they merely seek to prevent all kinds of speech, at the premises, by closing their doors forever by labelling it a public nuisance.

As did the system condemned in *Bantoam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this method of obscenity regulation conveniently makes recourse to the criminal process unnecessary.

"Any prior restraint on expression comes to [the Supreme Court] with a 'heavy presumption' against its constitutional validity. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

In considering the validity of an injunction forbidding the distribution of "any literature" by the petitioners, the Supreme Court, in *Organization for a Better Austin v. Keefe*, noted that

> "in a case of this kind the courts do not concern themselves with the truth oor validity of the publication. Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on *First Amendment* eights. Here, as that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distributions of literature 'of any kind' in a city of 18,000." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

The only difference between that case and the instant case is that the population of Birmingham is several times that of the City of Westchester, Illinois, the one referred to above and hence, a far greater number of people will be deprived of access to materials which are presumptively protected by the *First* and *Fourteenth Amendments* to the *Constitution of the United States*.

The proposed injunction, it should be noted, does not enjoin the sale or distribution of specific materials shared as "obscene" instead, by closing the store, it enjoins the sale of any press materials whether obscene or otherwise. The Court of Appeals for the Fourth Circuit has recently recognized that

> "The Supreme Court has made it clear that laws which regulate activities protected by the First Amendment must be more than merely rational, and are not accorded the presumption of constitutionality normally accorded to acts of the legislature. *United States v. Congress of Industrial Organization*, 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948)." *United States v. Crowthers*, 456 F.2d 1074, 1080.

The Court went on to hold that to abridge activities protected by the First Amendment.

> "the government must have a compelling interest to justify the abridgment and the scope of the abridgment must not be greater than reasonably necessary to serve the government's purpose. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945)." *United States v. Crowthers, supra*, at 1080.

The idea advanced above, sometimes referred to as the "less drastic means" doctrine, requires that

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purposes." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The Fifth Circuit has noted that in the area of *First Amendment* freedoms,

> "the overbreadth doctrine plays an important role, for it requires the legislature to focus narrowly on the particular evils it wishes to combat when speech is at stake," *Hobbs v. Thompson*, 488 F.2d 456, 470 (1971).

In *Roth v. United States*, 354 U.S. 476, 488 (1957), the decision upholding the right to regulate obscenity, it was said:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standard for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

The cases cited above make it clear that the blunderbuss approach to the regulation of obscenity represented by declaring the premises or the store to be a nuisance (even assuming valid, final convictions for violation of obscenity statutes thereon in the past) cannot be made to conform to the standard of the *First, Fifth* and *Fourteenth Amendments*. First, there is an adequate remedy at law for violations which have occurred in the past *i.e.*, the criminal penalty. Second, declaring the business to be a nuisance does not comport with the less drastic means test because it completely prevents the dissemination of even protected materials. Third, a lesser measure, an injunction against the dissemination of "obscene" materials, would operate as a prior restraint, would induce self-censorship, and would not give such notice as to what conduct was prohibited as to be enforceable. In addition, it would place the bookseller in the position of having to prove that he was not violating the injunction by proving the offending material is, in fact, protected. This is, of course, also contrary to established doctrine that the burden of proof is upon the censor. *Speiser v. Randall*, 357 U.S. 513 (1958). Fourth, there are no safeguards by which a judicial decision as to whether the materials are, in fact, protected will be forthcoming within any stated period of time, thus ensuring a restraint of only such duration as is necessary for sound judicial resolution of the issues. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and *Blount v. Rizzi*, 400 U.S. 410 (1971).

The decision of the Supreme Court of the United States in *Near v. Minnisota*, 283 U.S. 697 (1931), makes very clear the vice of the Appellees proposed procedure against Appellants wherein it states, at page 713:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter – in particular that the matter consists of charges against public officers of official dereliction – and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship."

The same judgment, that the operation and effect is "the essence of censorship", is appropriate here.

In a later portion of the opinion, the Court answered the argument that the statute dealth with publication *per se*, but with the business:

> "In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the 'business' of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the

> constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made." *Near v. Minnesota, supra,* at 720.

In 1962, the Supreme Court had before it the case of *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. That case concerned the proper construction of *18 U.S.C. § 1461* and its application to the nude male magazines involved therein. The concurring opinion at 370 U.S. 503, 504 of Mr. Justice Brennan, speaking for himself, Mr. Chief Justice Warren, and Mr. Justice Douglas, dealt with the possible constructions of the statute, which dealt with regulation of obscenity through the mails:

> "There are two possible constructions of § *1461* on the basis of this brief Senate discussion. One possibility is that short of breaking seals, the postmasters could remove matter which they thought from its face or the name of its sender to be obscene. The second construction is that postmasters could remove matter but only to turn it over to the appropriate authorities as the proposed subject of a criminal prosecution – and also of course after that material had been determined, in a criminal trial of its sender, to be obscene. Support for this second construction is found not only in the brief 1865 Senate consideration itself but also in an 1888 statute amending *§1461*, and enacting a second banning material with obscene matter on its fact and–unlike *§1461* – explicitly providing that it 'shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe.'

"The 1865 Senate discussion is not unambiguous, but I cannot suppose that Senator Johnson – who had already noted his awareness that much obscene material was discoverable without breaking seals, and even so, his determined opposition to its being stopped – would have accepted Senator Sherman's suggestion had he understood it to mean more than that the Post Office could stop obviously questionable matter for the purpose of transmitting it to prosecuting authorities, could stop matter already held obscene if it were sent again, and could investigate matter sent by persons previously convicted and, if the matter were found violative, could present it to the prosecuting authorities. I believe this is the correct construction of the 1865 enactment. But at least *it is arguably correct, and necessary if we are to avoid the section's probable constitutional infirmity (see Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 2d 1357, 51 S.Ct. 625; Summerfield v. Sunshine Book Co., 95 App.D.C. 169, 221 F.2d 42) if construed as a provision allowing the Postmaster General to exclude all matter sent by a person who had previously sent violative matter.*" (Emphasis supplied.)

The reasoning compels the conclusion that not only may materials not be proscribed which have not been judicially found obscene, but also that even assuming that a valid conviction has been obtained as a result of the sale of obscene material at a given location, it is not constitutionally permissible to put a blanket prohibition on further sales of any materials.

The validity of the reasoning and approach of the Supreme Court in *Near* is more apparent now than ever before. The Appellants herein who have not ever proven

violations of the law arising out of the business of the subject bookstore are engaged, purely and simply, in attempted censorship and suppression of materials which they cannot establish are unlawful, but which they personally find offensive. This Court, charged as it is with the duty of preventing erosions of those fundamental freedoms which set this country apart from all others, should not countenance such tactics.

Case law involving the suppression or attempted suppression of allegedly obscene materials on nuisance grounds is scant and not uniformly consistent. Nevertheless, the better reasoned opinions prohibit the kind of relief sought by the Appellees in their action.

A recent case, and one directly in point on the merits, is *Pursue, Ltd. v. Huffman,* _____F.Supp._____(No. C72-432, U.S.D.C.N.D. Ohio, decided April 20, 1973), discussed above. In that action a permanent injunction was issued against the enforcement of a state court order closing an Ohio theatre as a nuisance pursuant to an Ohio statute. The decision held that the statute and its application to the theatre constituted an overly broad prior restraint upon First Amendment rights.

In another case out of the U.S. District Court for the Western District of Tennessee, Western Division, entitled AIRWAYS THEATRE, INC. and SOUTHLAND THEATRES, INC., Plaintiffs, v. PHILIP M. CANALE, District Attorney General, DAVID M. PACK, Attorney General of Tennessee and WINFIELD DUNN, Governor of the State of Tennessee, Civil C-73-262, filed November 19, 1973, the court held that Tennessee's nuisance statute was unconstitutional. The statute

was held to be unconstitutional by this unanimous three-judge panel for at least two reasons; one of which related to the definition of places of nuisance, which could be applied to include one's home and secondly, that

> "seizures of press materials, fixtures, furnishings and equipment andstock used in or in connection with the maintaining or conducting of a nuisance, shall be subject to seizure immediately upon detection by any law enforcement officer ... thus, once there is a determination of obscenity by a law enforcement officer, seizure of the property may take place."

The three-judge court held that the procedure flew in the face of the decision of the U.S. Supreme Court in *Roaden v. Kentucky, supra*. (Opinion attached hereto as Appendix E.)

Several state courts have reached the same conclusion. In *New Riviera Art Theatre v. State*, 412 S.W. 2d 890 (Tenn. 1967), the Supreme Court of Tennessee construed a statute under which the District Attorney General of the Sixth Judicial District of Tennessee sought a temporary injunction enjoining the Defendants from showing or disposing of a film entitled "London Night Life" or other such film or acquiring such other films. A permanent injunction was prayed for, after a hearing, and a determination the films complained of were obscene.

After a hearing, the Trial Court found certain named films to be obscene and decreed, at 892:

> "It is, therefore, ordered, adjudged and decreed, pursuant to the authority in Tennessee Code Annotated, Section 39-3005 (c) that the defendants, New Rivieria Art Theatre of Chattanooga, Inc., and H.W. Hill, be permanently enjoined from the further or future showing of the films and 'Coming Attractions' or 'Trailers' of the sort, kind or type which may be classified by the court as 'obscene material' under the definition of Tennessee Code Annotated, Section 39-3007."

The Appellants insisted first, that the statute in question did not authorize the granting of an injunction, temporary or permanent, enjoining the showing of any and all films by the parties sought to be enjoined. The Court agreed, stating that the statute comprehended injunctions only against obscene material and added, at 412 S.W. 2d 893, 894, the following:

> "The granting of a temporary injunction prohibiting the defendants from showing any film had the effect of closing the theatre and was an unconstitutional application of the statute in violation of defendants' constitutional rights of freedom of speech and due process."

The Appellants also complained about the permanent injunction prohibiting defendants from showing other films and coming attractions or trailers of the sort, kind or type which may be classified by the Courts as obscene material.

The Court agreed:

> "The statute does not authorize an injunction to restrain the acquisition and display of unidentified films, coming attractions or trailers which a court might in the future hold to be obscene. Such a construction of the statute would vest in the courts an unlimited power of prior restraint on the freedom of speech and press.

"Such an interpretation would also place the burden upon the defendants of determining whether any film they might acquire might be classified by the court as obscene material."

"The burden is on the District Attorney General to show the material sought to be enjoined from sale or display is unprotected by the first amendment to the constitution of the United States. *Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965).

"We agree this portion of the decree is obviously in violation of the first, fifth and fourteenth amendments to the Federal Constitution. *Kingsley Books, Inc. v. Brown, supra.*" *New Rivieria Art Theatre v. State, supra*, at 895.

The Supreme Court of Florida, in *Mitchum v. Florida ex rel Schaub*, 250 So.2d 883 (1971), had occasion to consider a Trial Court's permanent injunction which was worded as follows:

"ORDERED AND ADJUDGED that the Respondents cease and desist from selling, offering for sale or causing to be sold or offered for sale obscene or pornographic publications in violation of F.S.A. 847.011 . . ."

The Court condemned this order succintly and directly:

"The 14th Amendment of the United States Constitution requires that regulation of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression or publication. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). The operation and effect of the method by which sale of publications is to be restrained must be very carefully defined. Cf. *Speiser v. Randall*, 357 U.S. 513 (1958). We are of the view that a blanket injunction is constitutionally invalid because it does not put the seller on notice as to what is prohibited, and thereby creates an unacceptable restraint upon his freedom to vend publications. Cf. *Smith v. California*, 361 U.S. 147 (1959); *Freedman v. State of Maryland*, 380 U.S. 51 (1965). See, *New Riviera Art Theatre v. State*, 412 S.W.2d 890 (Tenn. 1967)."

The Florida Court went on to note that a permanent injunction, reading as follows, had been entered by the Trial Court:

"ORDERED AND ADJUDGED that the operation of the Adult Book and Movie Store at 1437 Main Street in the City of Sarasota, Florida, by said respondents constitutes the maintaining of a public nuisance and Matthew Rocks and Bob Mitchum are hereby enjoined from the further operation of or maintenance of said business premises so as to annoy the community and to become manifestly injurious to the morals or manners of the people."

This, too, was found to be unacceptable.

"This injunction is also invalid. A business involved in the dissemination of publications cannot be declared a nuisance in this manner. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)."

The Florida Court also pointed out that the procedure utilized by the State of Florida to condemn the entire contents of the bookstore was deficient. Three exhibits had been presented to the Trial Court and were used to condemn the entire contents of the bookstore on the theory that they were "representative".

The Court rejected this approach:

"Unless a defendant is willing to stipulate that particular exhibits are absolutely representative of the stock offered the public, one copy of each item sought to be suppressed must be entered into evidence." *Mitchum v. Florida ex re. Schaub, supra.*

In rejecting the contention that one publication might be used to judge others not in evidence, the Court relied upon the Supreme Court's decision in *Marcus v. Search Warrant*, 367 U.S. 717 (1961). In that case, Missouri procedures for suppressing alleged obscenity were found to lack the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. The Court discussed the reliance by the Missouri Supreme Court on the Supreme Court's decision in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and found such reliance to be misplaced:

"The differences in the procedures under the New York statute upheld in that case and the Missouri procedures as applied here are marked. They amount to the distinction between 'a "limited injunctive remedy," under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene,' *Kingsley Books, supra* (354 U.S. at 437), and a scheme which in operation inhibited the circulation of publications indiscriminately because of the absence of any such safeguards. *First*, the New York injunctive proceeding was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene. The court, in restraining distribution pending final judicial determination of

the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place. *Second*, the restraints in *Kingsley Books*, both temporary and permanent, ran only against the named publication; no catchall restraint against the distribution of all 'obscene' material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation."

At this point, Footnote 28 was referred to and it cites the refusal of the Trial Court in *Kingsley Books, supra*, to allow the Defendants therein to do as the Appellees wish to do in their proceeding against Harem Book Store:

"28. The trial judge in *Kingsley Books* refused to enjoin the distribution of future issues of the publication in question, stating: '[u]nless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer.' 208 Misc. 150, 168, 169, 142 NYS 2d 735, 751. Cf. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625." *Marcus v. Search Warrant, supra*, at 735.

Thereafter, the Court pointed out other differences between the procedure in *Kingsley Books, Inc. v. Brown, supra*, and the Missouri procedure which are also relevant to the Georgia procedure:

> "*Third, Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material islegally obscene. This Court expressly noted there that the State was not attempting to punish the distributors for disobedience of any interim order entered before hearing. The Court pointed out that New York might well construe its own law as not imposing any punishment for violation of an interim order were the book found not obscene after due trial. 354 U.S. at 443, note 2. But there is no doubt that an effective restraint – indeed the most effective restraint possible – was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor." *Marcus v. Search Warrant, supra,* at 735, 7356.

More recent cases have been consistent with the theory espoused by Appellees herein. In *State of Indiana ex rel Thomas J. Blee v. Mohney Enterprises, et al.*, 289 N.E. 2d 519 (Court of Appeals of Indiana), Petition to Transfer to the Supreme Court of Indiana denied May 14, 1973, the approach of Appellees Slaton and McAuliffe herein was rejected by the highest Courts of Indiana. In that case Blee had sought to enjoin the operation of an adult bookstore, operated by Mohney, as a nuisance. The trial court found for Mohney and Blee, on behalf of the State of Indiana, appealed.

Blee had contended that an Indiana statute deeming any building or place used for the purpose of lewdness, assignation or prostitution a nuisance applied to the operation of a retail

bookstore selling allegedly obscene materials. He also had alleged that such operation constitutes a public nuisance enjoinable by a private citizen under I.C. 1971, 34-1-52-1; Ind. Ann. Stat. § 2-505 (Burns 1967) which reads:

> "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

Blee introduced into evidence several exhibits consisting of materials he and others had purchased at the bookstore. The Court, as had the trial court, did not pass on the contention that these materials were obscene.

The Court pointed out that what Blee sought to enjoin "is the dissemination by an adult bookstore, of *any* printed materials whatsoever, in Allen County" and that he did not seek to prohibit only the dissemination of specific, identifiable items.

The Court stated that any discussion of the issues tendered by Blee must be preceded by a determination whether such injunctive relief would be violation of the First Amendment to the Constitution of the United States.

After quoting *Roth v. United States*, 354 U.S. 476 (1957) and *Redrup v. New York*, 386 U.S. 767 (1967), the Court stated:

> "None of the above standards is broad enough to prohibit dissemination of materials which have not yet been printed.

This decision must rest upon the firmly established principle reiterated in *Organization for a Better Austin v. Keefe* (1971), 402 U.S. 415, that an "injunction, so far as it imposes prior restraint on First Amendment rights." [And it is impermissible where it] operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature of 'any kind' . .

The requested injunction would be an impermissible prior restraint and the trial court's denial thereof was proper. We therefore do not reach appellant's other contentions.

Judgment affirmed."

Nor may the Appellees herein be heard to say that the relief that they feel themselves entitled to in the suit sought to be enjoined herein is any different in substance from that described above. They seek, not a determination that certain named publications are obscene in the constitutional sense, but instead, they make demands for:

"1. Summons and an appropriate order for service of summons issued, and of all rules and others.

2. For an interlocutory injunction:

(a) For injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store . . ., by any person.

(b) For an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with

advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed.

3. That a Rule Nisi be issued instanter requiring the defendants named herein to show cause why the prayers of this complaint should not be granted."

The conclusion is inescapable that Appellees are engaged in a concerted action to impose a total and complete prior restraint upon the dissemination of *any* publications or materials by the Appellants without regard to the effect upon protected speech and the rights of the citizens of Alabama and of the United States to purchase materials presumed to be protected by the *First Amendment*.

The United States Supreme Court in the case of *Paris Adult Theatre I v. Slaton, et al*, 413 U.S. 49, (1973), held that a procedure which sought to condemn as obscene a single named film comported with constitutional requirements as the same procedure was applied in that case provided, the Court said, that the definition of obscene was not otherwise void for vagueness (the so-called *Roth-Memoirs* test) and incorporated by authoritative judicial construction or legislative enactment the standards set forth in *Miller v. California*, supra. In fact, including footnote 4, the majority of the Court suggests that his procedure is emanately fair when undertaken in the context therein prior to the institution of any criminal proceedings, and that the procedure would be even more fair if the disseminator had an opportunity to question the obscenity of the materials in a declaratory judgment forum prior to dissemination. The language of the decision and the footnote makes it clear that the Court was examining the

Georgia procedure as it related to the prohibition of a specific film and/or films, and not to a general total and complete restraint on all films, whether first determined to be obscene or not.

In fact, this Court suggests that all press material are presumptively protected until there is a judicial determination of obscenity in the opinion of the majority in *Roaden v. Kentucky*, supra. In this case we are dealing with an Alabama statute which authorizes, independent of any criminal proceeding, the closing of a bookstore or theatre as a public nuisance. If such is allowed to occur, then those who disseminate and exhibit adult materials would have to engage in the kind of "self-censorship" that would result in a "chilling of speech" that would ultimately have the effect of depriving adults of our society from access to non-obscene books which deal candidly with the subject of sex – a mysterious and powerful force in society.

Thus, we think the special circumstances exist that justify this Court confining the principles of *Younger v. Harris*, supra and *Samuels v. Mackell*, supra to the specific holdings in those cases, and this Court should not permit the doctrine to be extended to encompass the category of proceedings which relate to State imposition of civil sanctions to defeat the jurisdiction of the federal forum to litigate federal constitutional rights.

The procedures sought to be utilized by Appellees herein are being utilized to close a bookstore and theatre without regard to its contents and thereby prevent further dissemination at that location of any publication to anybody, by any person.

Clearly, this impermissible prior restraint justifies relief in a federal forum when sought by a proper party. *Zwickler v. Koota*, 389 U.S. 241, 19 L.Ed.2d 444 (1967).

It is also clear that *Palaio, supra*, relied on by the District Court, is fully outside the scope of this case. In that case, the Court was concerned not with the enjoining of continuing activity, but with the enjoinment of the showing of specified films deemed to be obscene by a civil action in the State of Georgia. The case herein is markedly different and is on all fours with the facts as set out in *Near v. Minnesota, supra*. There, efforts were made to enjoin the publication of a newspaper because it had continually violated the law by printing "malicious" material. The Court, however, found that the use of a permanent injunction to be heavy handed, overbroad and unconstitutional, and also found that it was a mere civil proceeding, without punishment, but a proceeding that effected a prior restrain and censorship.

> "For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its liked laws. As has been noted, the statute in question does not deal with punishment; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication." 283 U.S. at 715.

The same situate exists herein. Whatever wrongs Appellants may have allegedly committed are subject to criminal prosecutions for violation of the substantive obscenity laws. Indeed, in this case, no final adjudication of such cases exists. The State cannot be allowed to punish

today for what they conjecture will occur tomorrow. This is especially true where the State has adequate criminal laws as weapons in its arsenal, and where cherished *First Amendment* rights are in dire jeopardy.

The Court in *Near, supra,* was not concerned with the validity of the charges against the newspaper, nor should the Court herein be similarly concerned about the validity of the obscenity allegations herein.

> "We should add that this decision rests upon the *operation and effect* of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, *cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.*" 283 U.S. at 723. (Emphasis supplied.)

Statutes may regulate speech only with narrow specificity or else cherished *First Amendment* freedoms will suffer. Real or vague threats of prosecutions, whether they turn out to be successful or not, clearly deter people from the free exercise of those rights. "So long as the statute remains available to the State, the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombroski v. Pfister,* 380 U.S. 479, 494. See, *NAACP v. Button,* 371 U.S. 415; *Keyishian v. Board of Regents of New York,* 385 US. 389; *Speiser v. Randall,* 357 U.S. 513; *Shelton v. Tucker,* 364 U.S. 479; *DeJonge v. Oregon,* 299 U.S. 353; *United States v. Baranski,* 484 F.2d 556 (CA-7 1973); *United States v. Dellinger,* 472 F.2d 340 (CA-7 1972); *United States v. Spock,* 416 F.2d 165 (CA-1 1969).

"The area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition. As we observed in Baggett v. Bullit, supra, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of thestatute piecemeal, with no likelihood of obviating similar uncertainty for others." *Dombroski, supra,* at 490-491.

Finally, as the Court in *Zwickler, supra,* said:

"We squarely held that the abstention doctrine in appropriate for cases such as the present one where ... statutes are justifiably attacked on their face as abridging free expression .... 380 US, at 489-490, 14 L ed 2d at 30. This view was reaffirmed in Keyishian v. Board of Regents, 385 US 589601, note 9, 17 L ed 2d 629, 639, 87 S Ct 675, when a statute was attacked as unconstitutional on its face and we said, citing Dombrowski and Baggett v. Bullitt, supra, [t]his is not a case where abstention pending state court interpretation would be appropriate ..." 389 U.S. at 254.

CONCLUSION

The three-judge district court was incorrect in applying the *Younger v. Harris* and *Samuels v. Mackell* considerations to the Appellants' Complaint and Petition for Injunctive and Declaratory Relief because there was no criminal prosecution involved. The reliance upon *Palaio v. McAuliffe* was misplaced as that decision's "civil as basically enforcement of a criminal statute" rationale as clearly erroneous. Even assuming that the comity considerations do apply the threat of the closing of a business provides the necessary special circumstances and irreparable injury to support injunctive and declaratory relief against the enforcement of statutes authorizing an impermissible prior restraint upon the distribution of materials conceded to be entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States.

This Court should reverse the dismissal of Appellants' action and direct the three-judge district court to proceed to a determination on Appellants' Constitutional claims.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

vs.

WILLIAM J. BAXLEY, in His Capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in His Capacity as Prosecuting Attorney for the Tenth Judicial Circuit of Alabama; and HERBERT JENKINS, JR., in His Capacity as Assistant City Attorney for the City of Birmingham, Alabama,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division

BRIEF

Of Appellee Herbert Jenkins, Jr., in His Capacity as Assistant City Attorney for the City of Birmingham

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On Appeal from the United States District Court for the Northern District of Alabama, Southern Division

BRIEF

Of Appellee Herbert Jenkins, Jr., in His Capacity as Assistant City Attorney for the City of Birmingham

QUESTIONS PRESENTED

I

Whether or not the principles of the series of cases headed by *Younger v. Harris*, 401 U.S. 376 (1971), are applicable to a pending state court proceeding to abate a nuisance which proceeding is pursuant to state statutes in aid of state criminal laws.

STATEMENT OF FACTS

The appellee, Herbert Jenkins, Jr., as Assistant City Attorney for the City of Birmingham, filed on behalf of the State of Alabama, a suit dated Mar 7, 1973, in the Circuit Court for the Tenth Judicial Circuit of Alabama—In Equity—Case Number 177-199, against appellants, MTM, Inc.; Chester McKinney; Thomas McGary and fictitious parties, under the Alabama Nuisance Law, Title 7, Sections 1091-1108, Code of Alabama 1940 (Recompiled 1958), to abate the maintenance of a nuisance at the Pussycat Adult Theatre at 7610 First Avenue North in the City of Birmingham, Alabama, which was for the continued and repeated violations of the City of Birmingham Obscenity Ordinance Number 67-2, and based upon numerous convictions for violation of said ordinance by the appellants which said convictions cumulated to a noxious public nuisance.

A temporary injunction closing the nuisance was granted by the State Court against appellants on May 24, 1973, after a hearing, and in the meantime the appellants filed the present suit in the U. S. District Court for the Northern District of Alabama seeking to enjoin the enforcement of the temporary injunction and for a declaratory judgment that the State statute under which the temporary injunction was obtained is unconstitutional as written and or as applied. No appeal was taken in the State Court proceedings as to the issuance of the temporary injunction although an appeal was available in the State Courts. No final hearing upon the issue of whether the injunction should be made permanent was had at the request of appellants or with their approval pending the outcome of the federal suit.

After a hearing in the U. S. District Court before a three-judge panel, a judgment was entered on October 18, 1973,

denying the relief sought based upon the principles of equity, comity, and federalism announced in the case of *Younger v. Harris*, 401 U.S. 376 (1971).

A Notice of Appeal to the Supreme Court of the United States was filed by appellants on the 9th day of November, 1973.

On January 21, 1974, this appellee received appellants' Statement of Jurisdiction which was filed on January 16, 1974, in the Supreme Court.

Review was granted on March 18, 1974.

Brief and appendix of appellants was received on August 12, 1974 which was due to be filed on May 2, 1974.

Appellee has not received a notice of an extension of time for such filing and therefore the appeal was not perfected within the time allowed from the granting of the review on March 18, 1974.

ARGUMENT

The appellee urges this Honorable Court to affirm the judgment of the U. S. District Court for the Northern District of Alabama—Southern Division—on the ground that the appeal fails to present any substantial federal question and further that this case is not one for appeal and does not require further argument.

The issue involved here has been answered both in *Younger v. Harris*, 401 U.S. 37, and in *Mitchum v. Foster*, 407 U.S. 225. This Honorable Court made it clear in these two cases that federal intervention in state court proceedings which are pending is not permitted in the absence of certain exceptional circumstances.

The appellants seem to believe that the judgment of the District Court was wrong because of its determination that the proceeding in question was in the nature of a criminal action. Although they admit the numerous convictions for violation of the City obscenity laws, it is insisted that the State Nuisance Statute permits only a civil action and not a criminal one, and that therefore the principles of *Younger v. Harris*, supra, do not apply. The action in the state court sought to be enjoined is still pending. It was an action taken in aid of the criminal laws of this state and its subdivisions. In *Gibson v. Berryhill*, 411 U.S. 564, this court indicates that the principles of *Younger v. Harris* are applicable to at least quasi-criminal cases pending in state courts and that if a state court has held an action is quasi-criminal in nature then the federal court will so consider it and apply *Younger* principles. The Alabama Supreme Court has held that an action under the statutes here involved may be deemed a quasi-criminal action. *Ridge v. State*, 206 Ala. 349, 89 So. 742. Obviously, this appeal presents an unsubstantial question and does not deserve this court's attention nor does it need further argument.

In *Gibson v. Berryhill*, supra, this court explicitly said that pending criminal proceedings to which Younger principles are applicable include cases involving quasi-criminal proceedings. There the court said in discussing the *Geiger* cases cited and quoted in *Gibson* as follows:

> "Appellants now insist not only that the issue is posed here by the pendency of proceedings before the state board, but also that the issue was actually decided following Younger by our summary affirmance in the case of *Geiger v. Jenkins*, 401 U.S. 985, 91 S.Ct. 1236, 28 L.Ed.2d 525 (1971). In that case the State Medical Board of Georgia noticed hearings on charges filed against a medical practitioner who immediately brought suit in federal court under § 1983 seeking an injunction on the ground that the underlying statute the Medical Board sought to enforce was unconstitutional. The District Court dismissed the action without reaching the merits, holding that the state proceedings were 'in the nature of criminal proceedings,' sufficiently so in any event to trigger the 28 U.S.C. § 2283 bar to federal intervention. 316 F.Supp. 370 (ND Ga. 1970). The decision was appealed to this Court and summarily affirmed without opinion but with citation to Younger and Mackell." At page 1696, 93 S. Ct.

Also, this court said there that if in a case in question there is a judicial finding that under applicable state law the nature of the pending proceedings in the state court is quasi-criminal, then it would be appropriate to apply Younger and dismiss it. The Alabama Supreme Court has in *Ridge v. State*, supra, held that an action under the statute here involved could be deemed to be a quasi-criminal action. In keeping with *Geiger* and *Gibson*, the District Court, although citing a different case, found that the action made the subject of this suit was in the nature of a criminal proceedings. The court indicated that it was at least "sufficiently so in any event to trigger the 28 U.S.C. § 2283 bar to federal intervention." In so doing, the District

Court came to the same conclusion as to the instant action as was made in *Geiger*. That was in keeping with the U. S. Fifth Circuits reasoning in the cases cited by the court in its opinion *Duke v. Texas*, No. 71-2845 (C. A. 5, 4/20/73); *Palaio v. McAuliffe*, 466 F.2d 456 (C. A. 5, 1971). So finding, it was incumbent upon the District Court to dismiss the complaint below.

Appellants do not argue that the nature of this case is purely civil since appellants admit it was to prohibit further repetitious violation of obscenity laws, and they admit the action was pending when this suit was filed. Such action was not an administrative remedy or proceeding, but a quasi-criminal one instituted in aid of enforcement of the laws of Alabama or its subdivisions. Additionally the obscenity convictions made the basis of this suit are still pending in the state courts and are on appeal. In *Gibson*, it was inferred that even an administrative proceeding, if it be deemed quasi-criminal in nature, would be a "sufficient pending criminal proceeding" within the ambit of Younger.

In any event, this court clearly emphasized in *Steppel v. Thompson*, — U.S. —, 94 S. Ct. 1209, — L.Ed.3rd —, that when there is pending a state criminal prosecution, the federal courts will not intervene in the absence of those unusual circumstances which may constitute an exception to 28 U.S.C. 2283.

Furthermore, the principle of *Kenosha v. Bruno*, — U.S. —, 93 S. Ct. 2222, — L.Ed.3rd —, that a civil rights action for declaratory and injunctive relief against municipalities will not be entertained in federal court because they are not "persons" is also applicable to actions against the state even though such a suit only names prosecuting officials in their official capacities and fails to allege that such parties acted outside their official capacities. In such cases, the relief sought is actually against the government and should not be allowed. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). This principle is aside from that of Prosecuting Officials' judicial immunity in such cases. *Pierson v. Ray*, 386 U.S. 547.

CONCLUSION

For the reasons stated, it is respectfully urged that the action of the District Court be affirmed.

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